Petition

No. 81-253

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNIVERSAL SECURITY INSTRUMENTS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
INDUSTRIAL UNION OF MARINE AND SHIPBUILDING
WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority and violated fundamental principles of federal labor law by imposing a bargaining representative, through the legal fiction of accretion, upon employees who never had an opportunity to determine, by secret ballot election or otherwise, whether or not they desired such representation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Universal Security Instruments, Inc.,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 12, 1981.

OPINION BELOW

The opinion of the Court of Appeals (1a) is reported at 649 F.2d 247. The Decision and Order of the National Labor Relations Board (hereinafter referred to as "the Board") is reported at 250 NLRB No. 92 (29a-41a).

[1] Hereinafter referred to as the "Company" or the "Petitioner."

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1981 (1a), and a subsequent Order clarifying the Court's May 12 Order was entered on June 17, 1981 (27a-28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 8(a)(5) of the National Labor Relations Act, *as amended*, 29 U.S.C. Section 158(a)(5), provides as follows:

> Section 8(a): It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 7 of the Act provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

STATEMENT OF THE CASE

I.

The Board's Findings of Fact

Universal Security Instruments, Inc. was founded in 1969 and initially engaged in the manufacture of electromechanical sirens and other security equipment (2a). Its first sizeable facility was a leased manufacturing plant which opened in 1971 on Potee Street in Baltimore, Maryland (2a).

In 1973, the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (hereinafter referred to as "the Intervenor" or "the Union") gained representation rights through a Board-conducted election at the Potee Street plant, following which the Company and the Union entered into a three-year collective bargaining agreement recognizing the Union "as the exclusive bargaining agent for all production and maintenance employees employed by the Company at its Baltimore, Maryland facility at 2829 Potee Street."(3a).

Shortly thereafter, the Company expanded its production into the manufacture of electronic smoke detectors and sirens. As the public demand for electronic smoke detectors grew, the Company in 1975 expanded its smoke detector operations by opening a leased warehouse located at Hollins Ferry Road, which was approximately 2.7 miles from the Potee Street plant (3a). Having initially staffed its Hollins Ferry Road facility with Potee Street employees, who retained their Union membership and continued to be covered by the contract, the Company in May 1976 formally agreed to extend recognition to the Union at Hollins Ferry Road in return for the Union's agreement to a premature termination of its original collective bargaining agreement (which was to expire in August, 1976) and the execution of a new three-year agreement (3a-4a). The

recognition provision of the contract was accordingly amended to reflect coverage of its terms to employees at both Potee Street and Hollins Ferry Road (4a).

As the public demand for smoke detectors continued to increase over the following months, by mid-1977 the number of employees hired at Hollins Ferry Road expanded from the orginal 40 employees to 300. The Hollins Ferry Road facility, however, quickly proved inadequate, being both overcrowded and unsafe (4a), a fact which was recognized by the Union.

As the Company's production and sales expanded, it located and purchased a "new permanent site" in March 1977. The new facility, which was more than adequate to accommodate the Company's future plans, was located in Owings Mills, Maryland, approximately 27 miles northwest of the Potee Street and Hollins Ferry Road plants (4a).

From the time that the Owings Mills plant began production in mid-September 1977, it was intended to supplement, rather than to replace, the Hollins Ferry Road electonics plant (4a). Thus, instead of transferring substantial numbers of production employees from Hollins Ferry Road to Owings Mills, the Company filled its entire Owings Mills work force with new hires.

Even before the Owings Mills plant opened its doors in September, 1977, the Union was fully aware of its existence and location (5a). Union representatives made repeated trips to the new plant during August and September, 1977, and on or about September 12, 1977, inquired of Company officials whether the Company would recognize the Union at Owings Mills (5a). The Company's labor counsel later informed the Union that the Company did not intend to recognize it at Owings Mills.

The Union's response to the Company's refusal to recognize it at Owings Mills was to initiate an organizational effort among Owings Mills employees. Thus, on at least three occasions in late September and early October 1977, Union representatives appeared on the Owings Mills parking lot, distributed Union literature, and urged employees to join the Union (5a). These efforts having apparently failed, the Union filed a grievance on November 8, 1977 under its collective bargaining agreement, in which it characterized the Company's failure to recognize it at Owings Mills as an alleged breach of the contract (5a).

In a final effort to gain recognition at Owings Mills, the Union on November 17, 1977 filed the unfair labor practice charges with the Board which resulted in the Board order from which this appeal was taken.

Eventually, the poor and overcrowded working conditions at Hollins Ferry Road, coupled by a sudden drop in the smoke detector market, impelled the Company to completely discontinue its operations at Hollins Ferry Road. On February 2, 1978, the Company informed the Union by letter that "[b]ecause of pressing economic circumstances, it will probably be necessary for the Company to close its Hollins Ferry Road, Baltimore plant within the next few weeks." (7a). The Company further informed the Union of its intention "to offer employment to as many of the Hollins Ferry Road plant employees as possible at our new facility in Owings Mills," and offered to meet with the Union "to discuss all aspects of this matter, including, but not limited to, the impact that such a closing would have upon the employees."(7a).

Consistent with its stated intention to the Union, the Company offered, in order of seniority, each and every Hollins Ferry Road employee the opportunity to accept employment at Owings Mills (7a). All employees who

accepted offers of transfer to Owings Mills were in fact transferred to Owings Mills, at no loss of pay, and indeed, some with an increase in pay; those employees who declined transfer were placed on a preferential hiring list for the Potee Street facility (7a). In all, 31 employees refused reassignment, 2 of whom were transferred to Potee Street, while the remaining 29 employees were placed on a preferential hiring list for Potee Street. By the end of February, 1978, when the Hollins Ferry Road plant shut down entirely, 72 Hollins Ferry Road employees had accepted reassignments to Owings Mills (7a).

II.

The Board's Decision and Order

Based upon its evaluation of the facts, the Board concluded, *inter alia,* that the Company violated Sections 8(a)(5) and (1) of the National Labor Relations Act, *as amended,* 29 U.S.C. §§ 158(a)(5), 158(a)(1) (hereinafter referred to as "the Act"), by refusing to recognize and bargain with the Union and to apply the terms of the Potee Street-Hollins Ferry Road contract to the Owings Mills facility, on the theory that as of September 12, 1979, the Owings Mills plant constituted an "accretion" to the bargaining unit represented by the Union at Potee Street and Hollins Ferry Road.[2]

III.

The Judgment of the Court of Appeals

The United States Court of Appeals for the Fourth Circuit agreed, *inter alia,* with the Board's finding that as of September 12, 1977, the Owings Mills plant constituted an "accretion" to the Potee Street-Hollins Ferry Road

[2] The Board's other findings, both for and against the Company, are not in issue here.

bargaining unit which was represented by the Union, and accordingly, enforced the Board's order requiring the Company to recognize the Union as the exclusive bargaining representative of the employees at that facility and to apply the terms of the Potee Street-Hollins Ferry Road contract to those employees (1a).

REASONS FOR GRANTING THE WRIT

I.

Since the Petitioner does not here seek review of the Board's findings respecting its purported duty to bargain with the Union over the closing of its Hollins Ferry Road plant, this case does not involve the question recently decided by this Court in *First National Maintenance Corp. v. N.L.R.B.*, ___ U.S. ___, 49 U.S.L.W. 4769 (June 22, 1981).

What this case does involve, however, is the validity of the Board's application of the legal fiction of "accretion" as justification for the imposition of a bargaining agent and a collective bargaining agreement which, by its own terms, covered only employees of the Company's Potee Street and Hollins Ferry Road plants, to the employees of a newly opened facility *located 27 miles from those unionized plants*, none of whom were ever afforded the opportunity, in a secret election, to express their preference for union representation.

Thus, when the Company's Owings Mills plant opened in September, 1977, the Company staffed that facility entirely with new hires, none of whom had ever been employed at either the Potee Street or Hollins Ferry Road plant. Until late October, when a few Hollins Ferry Road employees were offered reassignment in order to train the new Owings Mills employees, not a single one of the 65 initial hires at Owings Mills was a former member of the bargaining unit. Between October 1977 and the cessation of operations at Hollins Ferry Road in February 1978, only

15 out of the approximately 75 production and maintenance employees at Owings Mills were reassigned from Hollins Ferry Road (6a), and none was reassigned from Potee Street.

Thus, the Union certainly did not represent a majority of the Owings Mills employees on the critical date (September 12, 1977) when the Board determined that the Owings Mills plant constituted an "accretion" to the Potee Street-Hollins Ferry Road bargaining unit, nor did it represent a majority of Owings Mills employees at any time during 1977, including on the dates when the Union formally demanded recognition, both in its grievance and in its unfair labor practice charges.

As with the rank-and-file employees, none of the supervisors hired at Owings Mills prior to September 1977 came from either Potee Street or Hollins Ferry Road. Virtually all of the machinery installed in the Owings Mills plant was purchased exclusively for that facility, and even when production at Hollins Ferry Road was completely terminated, only a small percentage of the equipment at Hollins Ferry Road was transferred to Owings Mills.

While many of the jobs performed at Owings Mills paralleled jobs performed by employees at Hollins Ferry Road, considerably more sophisticated equipment and processes were installed at Owings Mills, while working conditions at the new plant were vastly different from, and vastly improved over, those which had existed at Hollins Ferry Road.

Yet despite these significant distinctions in working conditions, the 27-mile distance separating Owings Mills from the Hollins Ferry Road and Potee Street plants, and the absence of a single former Hollins Ferry Road or Potee Street employee from the payroll of the Owings Mills plant

on September 12, 1977, the Board and the Court of Appeals concluded that as of that time, "the employees working at . . . the Owings Mills plant constituted an accretion to the existing bargaining unit of production and maintenance employees at . . . Potee Street and Hollins Ferry Road, . . . and that by refusing to recognize the [Union] as the exclusive collective bargaining representative of the production and maintenance employees at the Owings Mills plant and to apply the terms of the contract to them," the Company violated Sections 8(a)(5) and (1) of the Act (8a).

In its landmark case of *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court noted that "[t]he most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9(c) of the Act (29 U.S.C. § 159(c)); it is also, from the Board's point of view, the preferred route." 395 U.S. at 396. Indeed, in a footnote to its opinion in *Gissel*, this Court noted further that "[a]n employer, of course, may not, even if he acts in good faith, recognize a minority union." 395 U.S. at 396, n.8.

In considering and passing the 1947 amendments to the National Labor Relations Act, Congress was not unconcerned with the imposition of a bargaining agent upon unwilling employees who had not validly and lawfully designated that union in a free and uncoerced manner. Thus, Section 7 of the Act was amended to provide that employees "shall . . . have the *right to refrain* from" joining or assisting labor organizations or engaging "in other concerted activities for the purpose of collective bargaining . . ." 29 U.S.C. § 157. (Emphasis added).

Recognizing that the secret election process is, indeed, "the preferred route" by which workers were to freely select their bargaining representative under the statutory

scheme created in the 1935 and 1947 statutes, the Board and the Courts, including this Court, have sanctioned bargaining orders without elections where, for example, an employer's unfair labor practices were sufficiently egregious so as to effectively prevent the holding of a free and uncoerced election. *N.L.R.B. v. Gissel Packing Co., supra.* In *Gissel,* however, the predicate for imposing such a bargaining order was the union's demonstrated majority status, as evidenced by valid authorization cards signed by a majority of the employees in the bargaining unit.[3]

In the case at bar, however, the Board directed the Company to recognize and bargain with the Union as the representative of its Owings Mills plant employees, despite the absence of any secret ballot election, or indeed, without even a showing of Union majority status at that plant through authorization cards or by some other objective evidence; and, as of September 12, 1977, when the Board and the Court determined the Company's bargaining obligation to exist, despite the complete absence of any former Union employees from either Potee Street or Hollins Ferry Road at the Company's Owings Mills plant.

In order to reach this result, which is totally inconsistent with the basic notion of affording employees the freedom to select their bargaining representative (even if simply by signing a Union authorization card), the Board invoked the legal fiction of characterizing the Company's Owings Mills plant as an "accretion" to the then existing bargaining unit at Potee Street and Hollins Ferry Road.

[3] The Board and the Courts have consistently rejected the imposition of a *Gissel* bargaining order where the Union has failed to demonstrate its majority status, regardless of the pervasiveness of the employer's unfair labor practices. *See, e.g., Herbert Halperin Distributing Corporation,* 228 NLRB 239, 247 (1977), and cases cited therein; *J.P. Stevens and Co., Inc.,* 163 NLRB 217 (1967), *enf'd as modified,* 388 F.2d 869 (2nd Cir. 1967); *The Loray Corporation,* 184 NLRB 557 (1970).

The doctrine of accretion was identified by the Board in *Gillette Motor Transport, Inc.*, 137 NLRB 147 (1962), where, in the context of a unit clarification proceeding, the Board allowed the addition to an already existing bargaining unit of some nine employees employed by a company which merged with the employer of the employees in the preexisting unit who, the Board determined, fell into classifications already included within the unit and worked within and were an integral part of such unit. The most obvious example of accretion is the addition of employees to an existing unit through normal turnover.

In the case at bar, however, the Board did not confine itself to accreting a handful of employees employed in the same or an adjacent location into the Union's bargaining unit, but rather, determined that *an entire plant* (the Owings Mills facility), located 27 miles from the other plants and employing some 65 newly hired employees who had never expressed any interest in representation by the Union, constituted an accretion to the Potee Street-Hollins Ferry Road unit. In so finding, the Board (with the concurrence of the Court of Appeals) ostensibly applied the same test used to determine the appropriateness of a multi-plant unit for collective bargaining purposes. *Bryan Infants Wear Co.*, 235 NLRB 1305 (1978). Thus, the Board purportedly applied the following factors, "the balance of which," it concluded, supported a finding of accretion in this case:

> ["The] integration of operations; centralization of managerial and administrative control; geographic proximity; similarity of working conditions, skills, and functions; having control over labor relations; collective bargaining history; and interchangeability of employees." (59a), *citing The Great A&P Tea Co. (Family Savings Center)*, 140 NLRB 1011, 1021 (1963)).

Totally overlooking the significance of the 27-mile distance separating the Owings Mills plant from the Hollins

Ferry Road plant, as well as the complete absence in September 1977 when the "accretion" was determined to have occurred, of any Union employees at Owings Mills, the Board relied instead upon: (1) the purported similarity of employee skills and functions at both plants; (2) the unproven assumption that "both plants drew their workers from the metropolitan Baltimore labor pool" (App. 12a); (3) the fact that "Universal advertised for workers not only in suburban Baltimore newspapers but also in the Baltimore *Sun*" (12a); (4) the "proximity" of the Owings Mills plant "to a Baltimore city bus route which also ran past Potee Street" (12a); (5) "[a] centralized management system . . . [including centralized] employee relations" (12a); and (6) "a similarity of products produced" by the various plants (12a).

The Board's and the Court of Appeals' willingness to overlook the 27-mile distance between the bargaining unit facilities and the Owings Mills plant, relying instead upon the purported "centralization" of various management functions for the three plants, including Owings Mills, flies in the face of longstanding Board law which, in the context of representation proceedings, invokes an almost insurmountable presumption of the appropriateness of a single-plant unit. *Dixie Belle Mills, Inc., A Wholly-Owned Subsidiary of Bell Industries, Inc.*, 139 NLRB 629 (1962); *Captital Bakers, Inc.*, 168 NLRB 904, 905 (1967). Even where, in a representation proceeding, there is a demonstrated degree of centralized management over such matters as purchasing, marketing, and even personnel, as in the instant case, the Board and the reviewing courts have nevertheless not hesitated to find a single-plant unit to be presumptively appropriate. *See, e.g., Hamburg Knitting Mills Company*, 239 NLRB 1231 (1979); *Black & Decker Manufacturing Co.*, 147 NLRB 825 (1964); *Sav-On Drugs*, 138 NLRB 1032 (1962); *American Wholesalers, Inc.*, 222 NLRB 917 (1976), *enf'd sub nom. N.L.R.B. v. American*

Wholesalers, Inc., 546 F.2d 574 (4th Cir. 1976); *N.L.R.B. v. Quaker City Insurance Co.*, 319 F.2d 690 (4th Cir. 1963); *Corrie Corporation of Charleston v. N.L.R.B.*, 375 F.2d 149 (4th Cir. 1967).

In *Sheraton-Kauai Corporation v. N.L.R.B.*, 420 F.2d 1362, 1365-6 (9th Cir. 1970), the Court of Appeals for the Ninth Circuit was confronted with a similar situation. Referring to the Board's *Sav-On-Drugs* decision and its progeny, the Court there noted that:

> These rulings directly concerned unit determinations in connection with initial representation petitions. As the Board has noted, however, essentially the same factors are involved in determining whether employees at a subsequently established single location should be absorbed into an existing multiple-location unit without their consent. *In the latter situation, section 7 rights are even more clearly at stake.* If the Board, in making its initial representation determination, decides that a multiple-location unit is appropriate, employees at each included single location have an opportunity to participate in the resolution of the representation issue. *But if employees at a new single location are simply absorbed into the multiple-location unit by accretion, they are denied that opportunity.* Nor does the procedure for decertification under section 9 of the Act provide an adequate remedy for these employees. Hence, the Board has held that even though it might have found an overall unit appropriate on a representation petition, and thus have given all employees at all locations an equal voice in the initial representation decision, *it would not "under the quise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." Melbet Jewelry Co.*, 180 NLRB No. 24 (1969). (Emphasis supplied; footnote omitted).

Similarly, in *N.L.R.B. v Masters-Lake Success, Inc.*, 287 F.2d 35 (2nd Cir. 1961), the Second Circuit also noted that the doctrine of accretion cannot be applied, even where the employer voluntarily agrees to recognize a union at an after-acquired facility, where the employee group sought to be added to an established bargaining unit is so composed that it may separately constitute an appropriate bargaining unit.[4] *See also Smith's Management Corp.*, 197 NLRB 1156 (1972).

Indeed, in *Hershey Foods Corporation*, 208 NLRB 452 (1974), the Board itself recognized that "[a]s a prerequisite to the addition of any such employee group to an established unit, the law requires the majority consent of those to be added, expressed either in a self-determination election or by some other lawfully acceptable method." 208 NLRB at 458. Yet with no concern whatsoever to the wishes of the Company's Owings Mills employees, the Board in the instant case, with the full acquiescence of the Court of Appeals, hesitated not at all to ignore its own longstanding rules regarding the presumptive appropriateness of a single-plant unit — particularly one located some 27 miles from the other plants operated by the Company — and, on the frail reed of finding that the Company's three plants operated under centralized management and employed employees with "similar skills" (12a), imposed a bargaining agent upon Owings Mills employees, none of whom have selected the Union to represent them. For, by finding that the accretion occurred on September 12, 1977 (30a), the Board and the Court of Appeals found an accretion at a time when *not one former* Hollins Ferry Road employee was working at Owings Mills.

[4] "The Board's action in thus permitting a new group of employees at a new store to choose freely a bargaining representative is fully in accord with the policy of § 7 of the Act, 29 U.S.C. § 157, and is a valid exercise of the Board's wide discretion in determining the appropriate bargaining unit." 287 F.2d at 36.

By doing so, we submit, the Board and the Court of Appeals have, "under the guise of accretion, compelled a group of employees who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their perference in a secret ballot election or by some evidence that they wish to authorize the Union to represent them." *Melbet Jewelry Co., supra*, 107 NLRB at 110.

This manifest disregard for the Section 7 rights of some 65 Owings Mills employees employed by the Company in September 1977, as well as the literally hundreds of workers subsequently employed at the plant who have never expressed any desire to be represented by the Union for collective bargaining purposes, and indeed, who have flatly rejected the Union's organizational efforts, raises a serious question of national labor law and policy warranting, we submit, consideration and correction by this Court. We have reviewed virtually every case in which the Board and reviewing courts have determined an employer's newly acquired facility to constitute an accretion to its organized plants, and are unable to find a single case in which the accreted facility was so geographically removed from the represented facilities as Owings Mills is from the Company's unionized plants in the case at bar. Thus, the decision of the Court of Appeals in this case constitutes a grave departure from established Board and Court precedent on this important area of labor law.

II.

The Court of Appeals' agreement with the Board's finding of "accretion" in the instant case is in conflict with the decisions of other Circuit Courts of Appeals, further warranting resolution by this Court. Thus, for example, in *Cooper Thermometer Co. v. N.L.R.B.*, 376 F.2d 684 (2nd Cir. 1967), the Court of Appeals for the Second Circuit

denied enforcement of a Board order which, like the Order in the instant case, required an employer to recognize the union which represented employees of its old plant, at its new plant to which it had transferred operations *and which was also located some 27 miles from the old plant.* Despite the transfer of virtually every supervisor, as well as approximately 15 percent of the old plant's unionized workforce to the new plant, the Court of Appeals there flatly rejected the Board's bargaining order at the new plant. Citing the Board's own decision in *Bickford Shoes, Inc.*, 199 NLRB 1346 (1954), in which it similarly refused to direct an employer to recognize the bargaining agent of its older plant's employees at a newly staffed facility located *28 miles away*, the Court of Appeals for the Second Circuit noted in *Cooper Thermometer* that "the Board has long been rather cautious before ordering an employer to recognize a union designated at the old plant as the bargaining agent at the new. Until very recently this has been done only when the distance was so short that there was considered to be no change in the bargaining unit . . ." 376 F.2d at 689.

In *N.L.R.B. v. Rapid Bindery, Inc.*, 293 F.2d 170 (2nd Cir. 1961), cited by the Second Circuit in *Cooper Thermometer, supra*, that Court again declined to enforce a Board order which would have required the employer to extend recognition of the union which represented employees at its older facility (which, like the Company's Hollins Ferry Road plant in the case at bar, was ultimately closed because it proved to be inadequate) to an entirely new plant which it opened 50 miles away. On the specific question of the appropriateness of a bargaining order encompassing the new plant, the Court in *Rapid Bindery* observed:

> [T]he portion of the [Board's] order that requires respondent to recognize the Union as the exclusive bargaining representative at [its new plant] is not

> proper inasmuch as the Union does not appear to represent any of the employees in [that] plant. *If it later should happen that a substantial number of [those] employees designate the Union as their representative, the Union could properly petition the Board for another election at that plant.* 293 F.2d at 177 (Emphasis supplied).

See also American Can Co. v. N.L.R.B., 535 F.2d 180 (2nd Cir. 1976), in which the Court agreed with the Board in concluding, on facts strikingly similar to those of this case, that a newly opened plant located 26 miles from the already represented plants did not constitute an accretion to the bargaining unit, and that the Company therefore had "no absolute or automatic obligation to recognize" the Union.

The Court of Appeals for the Third Circuit has similarly expressed its reluctance to impose a bargaining agent upon unwilling employees of a newly-acquired plant by accretion. Thus, in *N.L.R.B. v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3rd Cir. 1976), that Circuit Court noted that:

> An accretion and a unit determination are similar concepts, but the Board has restrictively applied the accretion principle since it operates to deny the accreted employees a vote on their choice of bargaining representative . . .

Although in *Security-Columbian Banknote* the Court found evidence of "centralized managerial and administrative control over both the unionized and newly-acquired nonunion facility," "an interchange of items commonly used in the production process," and even "possession of similar working skills and functions" by workers at both facilities, it nevertheless declined to find an accretion, concluding that "[t]he twenty-mile geographical separation alone is a strong factor against such a finding." 541 F.2d at 141.

The Court of Appeals for the Ninth Circuit in *Sheraton-Kauai Corp. v. N.L.R.B.*, *supra*, flatly expressed its disdain for the imposition upon unwilling, unrepresented employees of a bargaining agent by means of accretion, even where the addition of those employees to the already existing bargaining unit was pursuant to an agreement between the employer and the union. *See also Spartans Industries, Inc. v. N.L.R.B.*, 406 F.2d 1002 (5th Cir. 1969), in which the Court of Appeals for the Fifth Circuit expressed the same disdain for accreting unrepresented employees into a preexisting bargaining unit either by operation of law or by agreement between the employer and the union.

Finally, the Court of Appeals for the District of Columbia expressed its deep concern over the imposition of a "compulsory bargaining order" covering employees who have never voted in a Board election, where, as here, there was an absence of any evidence of Union majority status. Thus, in *Local 57, International Ladies' Garment Workers Union, AFL-CIO v. N.L.R.B.*, 374 F.2d 295 (D. C. Cir. 1967), *cert. denied* 387 U.S. 942 (1967), the Court refused to enforce the Board's extension of the employer's bargaining obligation from its plant in New York to a newly opened plant in Florida which was staffed by new hires, even though the Board was able to establish that the employer's move to Florida was intended to avoid its bargaining obligation. In so ruling, the Court, per Judge (now Chief Justice) Burger, stated:

> The right to choose a union and have that union operate in a climate free of coercion, which is the goal of Board compulsory bargaining orders, is a cornerstone of the National Labor Relations Act; equally protected by the Act with the right of the workers to choose that representative is the right to have none. Yet the remedy fashioned by the Board in this case imposes on the Florida workers a bargaining representative without reference to their choice. Such an

> infringement of the Florida employees' Section 7 rights might be justified if some rights of the New York workers depended on that balancing, or if for some other valid reason the Board considered it necessary to promote industrial peace.
>
> That the Board has deprived Florida workers of freedom of choice for only one year rather than two or three is hardly an answer if the right of choice is acknowledged. 374 F.2d at 301-2 (Footnotes omitted).

Upon review of the decisions of the various Circuit Courts of Appeals, the decision of the Fourth Circuit in this case appears to stand alone, and represents, we submit, a serious departure from the overwhelming demonstration of concern by the other Circuits for protecting, in Chief Justice Burger's words in *Local 57, supra*, "the right of the workers to choose" their bargaining representative or, conversely, their right "to have none." 374 F.2d at 301.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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August, 1981

APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 80-1494

Universal Security Instruments, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

and

Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO,
Intervenor.

On Petition for Review of an Order of The National Labor Relations Board.

Argued: February 4, 1981 *Decided: May 12, 1981*

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and WILLIAMS, District Judge.

Warren M. Davison (Earle K. Shawe, Leslie R. Stellman, Stephen D. Shawe, Shawe & Rosenthal on brief) for Petitioner; Susan L. Williams, National Labor Relations Board (William A. Lubbers, General Counsel, John E.

Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, William R. Stewart, Deputy Assistant General Counsel on brief) for Respondent; Michael Brodie (Freedman and Lorry on brief) for Intervenor.

The Hon. Richard L. Williams, United States District Judge for the Eastern District of Virginia, sitting by designation.

WILLIAMS, District Judge:

Universal Security Instruments, Inc. has petitioned this court to review a finding by the National Labor Relations Board of several violations of § 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. The Board, through its General Counsel, has cross-petitioned for enforcement of its order and the union has intervened on behalf of the Board.

I. *FACTUAL SETTING*

The facts of this case were laid out in the Decision and Order of the Board and in the Administrative Law Judge's (ALJ) decision. *See* 250 NLRB No. 92 (1980). While we feel no need to repeat all that is printed there, we must, however, explain the factual setting of this case in some detail.

Universal was founded in 1969 and initially manufactured electromechanical sirens and other security equipment. After several years of working in small facilities, the company leased a plant in Baltimore, Maryland on Potee Street in 1971. In 1973, the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO (the union), gained representation rights through a National Labor Relations Board conducted election. The

union was to represent the production and maintenance workers at the Potee Street plant.

In August of that year the union and the company signed a three-year collective bargaining agreement. The agreement, among other things, contained a clause which recited that it was to cover all production and maintenance workers "at [Universal's] Baltimore, Maryland facility, at 2829 Potee Street. . . ." The agreement also contained what was labelled a "Management Rights" clause which said that union "recognized that the Company shall have the sole and exclusive jurisdiction of the management and operation of its business, . . . and the right to relocate its plant or any portion thereof." The collective bargaining agreement extended to August 1, 1979, and this agreement was in effect at all times material to this case.

At about the same time that the company and the union were negotiating and signing the original collective bargaining agreement covering the Potee Street plant, the company entered the electronics field by making electronic smoke detectors and sirens. This was an expanding market, and because of this expansion, Universal leased a warehouse on Hollins Ferry Road in order to step up the production of smoke detectors and other electronic equipment. Hollins Ferry Road, which began production in 1975, was about 2.7 miles away from the Potee Street facility.

Universal originally staffed the Hollins Ferry Road plant with employees from Potee Street, who would punch in at Potee Street and be driven to Hollins Ferry Road. Eventually Universal hired employees directly for assignment to Hollins Ferry Road. The company voluntarily applied the union dues check-off provision of the existing collective bargaining agreement to the Hollins Ferry Road employees. In May of 1976 Universal formally recognized the union as the collective bargaining representative of the workers at Hollins Ferry Road without requiring proof

that the union represented a majority of the workers at that plant.

The company's markets continued to expand and by the spring and summer of 1977, 300 employees were working at the Hollins Ferry Road facility. However, all parties to this action agree, and both the ALJ and Board found, that the conditions at the Hollins Ferry Road plant were poor and both workers and management were dissatisfied with the facilities.[1] Because of these poor conditions, the company began to look for a new, better plant.

After considering several locations, Universal settled on a plant location at Owings Mills, Maryland, which was about 27 miles away from its other two facilities. This location was chosen because it was easily accessible by Baltimore public transportation and the company planned to hire from the Baltimore metropolitan area labor pool. In fact, one of the bus lines which served the Owings Mills plant also ran by the Potee Street plant, a factor which company officials considered to be positive.

In March of 1977, Universal purchased the Owings Mills plant with the intention of using it to supplement its production facility at Hollins Ferry Road but not to replace that facility. Production began at Owings Mills in mid-September, 1977.

[1] The ALJ on page 4 of his decision wrote:

> The ceilings were too high. Temperature and humidity could not be adequately controlled within and the employees were over-crowded. The Hollins Ferry Road facility was too hot in the summer and too cold in the winter. There was inadequate space for [Universal's] production operation. State and local authorities complained to [Universal] about fire hazards and inadequate sanitation.
>
> These conditions impaired plant operations. The overcrowded conditions in the plant production area caused [Universal] to move its research and quality control activity to a trailer. Further, these shortcomings caused poor productivity and poor product quality at the Hollins Ferry Road plant.

Although the company never informed the union formally of the impending expansion at Owings Mills, union members found out that the company was planning a new facility. They made several inquiries as to when the new plant was going to open and if the union would be recognized there, but these questions were never directly answered. In August or September of 1977 the site of the new plant was visited by union officials and on or about September 12, 1977 the union requested that Universal recognize it as the bargaining representative of the employees at Owings Mills. This request was denied by the company. After some organizational efforts by the union failed, the union filed a grievance against the company for denying this request. The General Counsel issued a complaint and notice of a hearing on January 6, 1978.

In early October, 1977, Universal officials decided that the Owings Mills plant, which was to be primarily staffed by newly hired employees, needed a certain number of experienced workers. Universal chairman Stephen Knepper authorized personnel director Robert O'Neill to recruit several Hollins Ferry Road employees for transfer to the new facility. O'Neill asked four Hollins Ferry Road workers if they would transfer to the new plant. He did not select the workers asked by seniority, but based the offers on recommendations by company management. Three of the four accepted the offer. At no time did the company notify the workers' bargaining representative that it was making these unilateral offers.

Again in late October the company offered transfers to 15 other Hollins Ferry Road employees, once again not selected on the basis of seniority. Twelve of these fifteen accepted the offer. The three who did not were laid off due to adverse business conditions.

By the end of September, 1977, Owings Mills had 65 production and maintenance employees, and by the end of October, 1977 the plant had 80 employees. Hollins Ferry Road at that same time had 200 and Potee Street about 50.

One of the 15 employees offered transfers in late October was Teresa Egitto. O'Neill informed her that she was laid off but could resume working at the Owings Mills plant. She testified that she was told that the work there would be the same, but that there was no union at the new facility and, because of this, the working conditions and benefits were better. She also claimed that O'Neill told her that if the employees at Owings Mills decided to have the union represent them, the working conditions at Owings Mills would deteriorate.

O'Neill also told several of the employees who had transferred that they would retain their seniority with the company for vacation purposes and other benefits, but that for layoffs, plant seniority would be the rule. Also, wages, benefits and other terms and conditions of employment were different from that which was negotiated with the union and embodied in the collective bargaining agreement.

Because of various market problems, Universal began to experience serious setbacks in the smoke detector market, beginning at the end of October, 1977. These setbacks forced a general layoff which affected the employees of all three of the company's plants. This layoff was terminated in January of 1978, but the market setbacks, along with the inefficiency of the Hollins Ferry Road plant, made that facility unprofitable for the company. On February 1, 1978, Universal's director of operations Amadee Dean recommended to chairman Knepper that Hollins Ferry Road be closed down. The next day Knepper decided to follow this recommendation and began to plan for the plant's closure by the end of that month. On February 3, Knepper authorized O'Neill to offer transfers to Owings Mills to the Hollins Ferry Road employees. That same day O'Neill began making offers to the employees on a seniority basis. Each employee was asked to fill out a card acknowledging that the offer was made and indicating his or her decision on the offer. Those who refused transfers to Owings Mills were told that positions might not be open at

Potee Street, but that they would be placed on a preferential hiring list for that plant.

Seventy-two of the Hollins Ferry Road employees accepted the offer of transfer and thirty-one declined. Of the 31 who declined, two were given positions at Potee Street. The other 29 were laid off.

In addition to beginning the transfer process, the company also wrote to the union regarding the closure of the Hollins Ferry Road plant. In a letter dated February 3, 1978, a lawyer for the company wrote to union officials to inform them that "it will probably be necessary for the Company to close its Hollins Ferry Road . . . plant within the next few weeks. . . . [T]he Company is hereby offering to meet with you, at a mutually convenient time and place, to discuss all aspects of this matter, including, but not limited to, the impact that such closing would have upon the employees at that plant." That letter also informed the union that offers of transfer were going to be made "to as many of the Hollins Ferry Road plant employees as possible."

The first group of Hollins Ferry Road employees who accepted the transfers began to arrive for work at Owings Mills as early as February 8, 1978. They were told of the new health and wage improvements, which were different from those called for under the collective bargaining agreement. They were also told of the change in the seniority system for layoffs. At this meeting O'Neill also told the transferees that no union would be recognized at that plant and, because of this, working conditions and benefits would be better than they were at Hollins Ferry Road.

The first of several meetings with union officials did not take place until February 14. The principal issue between the company and the union was whether or not the company planned to recognize the union as the bargaining representative at the new facility. The company steadfastly refused to do so. Some other minor topics were brought

up, but apparently no major discussions were held on any other topics. The Hollins Ferry Road plant was closed permanently February 28, 1978.

The Board found that the production and maintenance employees at Owings Mills constituted an accretion to the bargaining unit at Potee Street and Hollins Ferry Road and, because of this, Universal had violated § 8(a)(5) and (1) of the Act[2] by refusing to recognize the union as the bargaining representative at Owings Mills and refusing to apply the terms of the collective bargaining agreement to the production and maintenance workers at that facility. The Board also found violations of these sections of the Act by Universal's unilateral transfer of unit working employees from Hollins Ferry Road to Owings Mills and by making offers of transfers to the employees without consulting and bargaining with the union. The Board also found the company's failure to bargain with the union over its decision to close the Hollins Ferry Road plant to be a violation of § 8(a)(5) of the Act and found that the company also failed to bargain with the union over the effects of that closing. The Board finally found that the company violated § 8(a)(1) by threatening employees with reprisals if they should try and have the union represent them at the new plant.

To remedy these violations the Board ordered:

(1) That the company cease and desist from these unfair labor practices and refrain from restraining employees in the exercise of their rights under § 7 of the Act;

(2) The company to recognize the union as the collective bargaining agent of the production

[2] § 8(a) reads as follows:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees. . . .

and maintenance workers at Owings Mills, to apply the terms of the agreement to those employees retroactively, and to make the employees whole for any losses they may have suffered as a result of the unlawful refusal to apply the terms of the agreement to them;

(3) The company to bargain upon request by the union, over the transfer of employees to the new plant, the closure of the Hollins Ferry Road plant and the effects on employees of the plant closures;

(4) A limited back-pay award to be made to the 29 employees who were laid off after refusing transfers to Owings Mills;

(5) The company post appropriate notices at the Owings Mills facility and the Hollins Ferry Road plant, should that plant ever reopen.

Universal has asked this court to review the Board's decision and order and the Board has cross-petitioned for enforcement.

II. *THE ACCRETION ISSUE*

The Board found that Universal's Owings Mills plant constituted an accretion to the Hollins Ferry Road plant as of September 12, 1977, the approximate date on which the union representatives requested recognition of the union at Owings Mills.

"'An accretion' occurs when new employees are added to an already existing [bargaining] unit." *N.L.R.B. v. Sunset House*, 415 F.2d 545, 547 (9th Cir. 1969). The additional employees are absorbed into the existing unit without first having an election "where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representative." *Lammert Indus. v. N.L.R.B.*, 578 F.2d 1223, 1225 n.3 (7th Cir. 1978).

If the employees hired and transferred to Owings Mills did constitute an accretion, Universal violated the Act by its failure to bargain, because it unilaterally changed wages, seniority and benefits — all unquestionably "terms and conditions of employment" within the meaning of § 8(d) of the Act[3] — of employees within a bargaining unit with which Universal already had a collective bargaining agreement. The company's duty to recognize the accretion is triggered by the request of the bargaining representative to negotiate. *Goodyear Tire & Rubber Co.*, 195 NLRB 767 (1972).

A finding of an accretion by the Board is similar to the Board's certifying a particular group of employees as an appropriate bargaining unit because in both the Board is using its expertise to determine the most appropriate mix of employees for a particular unit. *N.L.R.B. v. R. L. Sweet Lumber Co.*, 515 F.2d 785, 794 (10th Cir.), *cert. denied* 423 U.S. 986 (1975); *N.L.R.B. v. Security — Columbian Banknote Co.*, 541 F.2d 135, 140-41 (3d Cir. 1976). And, just as when the Board certifies a unit, the Board's finding of an accretion is a matter which is generally committed to its discretion. *N.L.R.B. v. R. L. Sweet Lumber Co., supra; Lammert Indus. v. N.L.R.B., supra; N.L.R.B. v. Security — Columbian Banknote Co., supra.* Thus, its finding "should not be set aside unless the reviewing court is convinced that the Board has acted in an arbitrary and capricious manner." *N.L.R.B. v. R. L. Sweet Lumber Co.*, 515 F.2d at 794.

[3] § 8(d) provides as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> . . .

In making its determination the Board must closely analyze the circumstances of the workers to determine whether the new and old employees truly share a "community of interest." To do this several factors are scrutinized. These are: (1) similarity of working conditions; (2) job classification; (3) skills and functions; (4) similarity of products; (5) interchangeability of employees; (6) geographical proximity; (7) centralization of managerial control; *Lammert Indus, v. N.L.R.B.*, 578 F.2d at 1225; (8) functional integration of the business; (9) collective bargaining history. *N.L.R.B. v. R. L. Sweet Lumber Co.*, 515 F.2d 785. *See also Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977).

> In determining whether a group of employees represents an accretion to an existing unit the Board must consider unique and complex sets of facts in light of the somewhat conflicting policies of stability in bargaining relations, . . . and assurance to employees of the right to choose their own bargaining agents.

N.L.R.B. v. Food Employers Council, Inc., 399 F.2d 501, 504 (9th Cir. 1968) (citations omitted).

Chairman Knepper testified before the ALJ that Owings Mills was established to supplement Hollins Ferry Road's production of smoke detectors and that both plants produced the same product — the SS-200 model smoke detector — until the October 31 general layoff.

Also, workers were required to have similar skills at both plants, demonstrated by the fact that 15 Hollins Ferry Road employees were transferred in October, 1977 to Owings Mills to provide the new plant with experienced workers and to help train newly hired employees. Further, in February, 1978 Universal offered its workers at Hollins Ferry Road transfers to Owings Mills when the company closed down Hollins Ferry Road. Both of these factors tend to show that there were similar skills required at the two facilities.

As for geographic proximity Owings Mills was about 27 miles away from Hollins Ferry Road. Despite this distance both plants drew their workers from the metropolitan Baltimore labor pool. In fact, Universal advertised for workers not only in suburban Baltimore newspapers but also in the *Baltimore Sun*. Also, Knepper chose the Owings Mills plant in part because of its proximity to a Baltimore city bus route which also ran past Potee Street.

A centralized management system controlled all three facilities. This included centralized control over production by director of operations Amadee Dean, who as part of his job established the qualifications for employees at Owings Mills. Also, the director of human relations, O'Neill, hired the new employees for Owings Mills and interviewed and transferred employees from Hollins Ferry Road to Owings Mills. He was in charge of hiring and firing and employee relations.

These factors relied upon by the Board show: (1) there was a similarity of skills required at Owings Mills and the other plants; (2) there was a similarity of products produced; (3) the new facility was geographically close to the other two facilities when the metropolitan area is viewed as a whole; and (4) management, and most importantly, employee relations, were centralized.

While the ALJ and the Board did not analyze all nine of the factors which have been identified in previous cases as helpful in making an accretion determination, those analyzed are certainly sufficient to show that the Board did not abuse its discretion in finding an accretion. There is no requirement that all of the listed factors be present, for to so require would be to hamstring the Board by requiring it to plug each unique case into an artificial test. The Board has a duty to "unearth[ ] the factors relevant to the accretion issue in the case under consideration . . . [and] then decide[ ] the relative weight to be attributed to each factor." *Kaynard v. Mego Corp.*, 484 F. Supp. 167, 172 (E.D.N.Y. 1980).

Universal argues to this court that the union did not represent a majority of the Owings Mills employees on the date it opened (September 19, 1977); when the union filed its grievance (November 8, 1977); on the date when the union filed its first unfair labor practice charge (November 17, 1977); when it amended the charge (December 9, 1977); or on the date the complaint issued in this case (January 6, 1978). The company's assertion is that newly hired employees at Owings Mills outnumbered those transferred from its other plants, and that the newly hired employees had never expressed a preference for union representation.

Universal's argument misses the mark. The important fact is that at the end of the summer of 1977, the number of employees in the bargaining unit at Potee Street and Hollins Ferry Road had risen to between 350 and 360. At the end of September, 1977, there were only 65 factory workers and 8 supervisors at Owings Mills. When an accretion occurs, the smaller group of employees is treated as if it were a group of newly hired employees replacing workers within the unit. Replacement employees are presumed to support the unit in the same ratio as those replaced. *Lammert Indus. v. N.L.R.B.*, 578 F.2d at 1226. Because of the "community of interest" found in this case, this smaller group at Owings Mills automatically became part of the bargaining unit.

The accretion doctrine is applied more restrictively when the new group of employees is larger than the original unit. "[T]he Board is cautious in making such a finding, particularly when the accreted group numerically overshadows the existing certified unit, because it would deprive the larger group of employees of their statutory right to select their own bargaining representative." *Renaissance Center Partnership*, 239 NLRB 1247, 1247-48 (1979). This, however, is not the case at bar. For the stated legitimate reasons the Board has found a smaller new group to be an accretion, and such was well within the Board's discretion. Since the Board was within its discre-

tion when it found an accretion, it follows that Universal violated § 8(a)(5) and (1) of the Act by its refusal to recognize the union as the bargaining representative of the Owings Mills employees and its failure to apply the collective bargaining agreement to those employees.

It also follows that Universal violated § 8(a)(5) and (1) by unilaterally changing terms and conditions of employment of employees subject to a collective bargaining agreement. Universal's bargaining obligation is defined by § 8(d) of the Act. That section provides, in summary, that neither party to a collective bargaining agreement can unilaterally modify the agreement without first serving written notice and offering to negotiate.[4] When a specific item is included in a collective bargaining agreement, any unilateral change, therefore, violates the duty defined by § 8(d) and made unlawful by § 8(a)(5) and (1). *N.L.R.B. v. Baltimore News American Division*, 590 F.2d 554 (4th Cir. 1979).

Since Universal did not live up to the duty imposed by § 8(d) and enforced by § 8(a), to provide written notice and to offer to negotiate, the Board was supported by substantial evidence when it concluded that Universal violated the Act by altering the conditions of employment for the employees at Owings Mills, including the transferees.

III. *THE CLOSING OF HOLLINS FERRY ROAD*

The Board found that Universal had also violated § 8(a)(5) of the Act by failing to bargain over both the decision to close the Hollins Ferry Road plant, and the effects that closure would have on the unit members working there. This involves two separate questions which will be addressed individually.

A. *The Decision.*

An employer is required "to confer in good faith with respect to wages, hours and other terms and conditions of employment." Section 8(d). Section 8(a)(5) makes it an

[4] See footnote 3 for full text of § 8(d).

unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees. . . ." These sections together make it an unfair labor practice for an employer to refuse to bargain in good faith over "wages, hours [and] . . . terms and conditions of employment," and these subjects are considered to be mandatory subjects over which the parties cannot lawfully refuse to bargain. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958). Bargaining subjects which are not mandatory are permissive and may be bargained over, but a party can also refuse to so bargain. *Id.*

The Board has taken the position in this and other cases that an employer's decision to close one of its plants — a partial closing[5] — is a mandatory subject.[6]

The various circuit courts have not all agreed with the Board, with some holding that an economically motivated decision is not a mandatory subject,[7] while two circuits have recently adopted a theory that a partial closing is rebuttably presumed to be a mandatory bargaining subject.[8]

This court has yet to address this issue directly.

Universal claims, however, that no matter what the answer to this question is, the collective bargaining

[5] A "partial closing" is considered to be a closing of one or more facilities by the employer having more facilities than those which he is closing. *Textile Workers' Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965).

[6] *See, e.g., Ozark Trailers, Inc.*, 161 NLRB 561 (1966).

[7] *See, e.g., Royal Typewriter Co. v. N.L.R.B.*, 533 F.2d 1030 (8th Cir. 1976); *N.L.R.B. v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969); *N.L.R.B. v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967); *N.L.R.B. v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *cert. denied*, 382 U.S. 1011 (1966); *N.L.R.B. v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

[8] *N.L.R.B. v. First Nat. Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 348 (Jan. 12, 1981); *Brockway Motor Trucks v. N.L.R.B.*, 582 F.2d 720 (3d Cir. 1978).

agreement it signed with the union gave the company the right to relocate its plant. The "management rights" clause in the agreement to which it points gave Universal the right to "relocate its plant or any portion thereof."[9]

Citing the Board's decisions in *Ador Corp.*, 150 NLRB 1658 (1965) and *Consolidated Foods Corp.*, 183 NLRB 832 (1970), Universal claims that the clause demonstrates that the parties to the agreement bargained over how a relocation decision could be made and gave management the exclusive right to decide without further bargaining to move to Owings Mills.

It is clear that a union can waive its right to bargain over a mandatory subject, but such waiver "must be clear and unmistakable." *The Dow Chemical Co.*, 212 NLRB 333 (1974). "While it is true that a labor organization may enter into an agreement in which it waives the right to bargain about mandatory subjects of bargaining (wages, hours, etc.) such waiver . . . will not readily be implied." *R. L. Sweet Lumber Co.*, 207 NLRB 529, 538 (1973).

The Board found that the "management rights" clause in the agreement between Universal and the union did not clearly and unmistakably cover the transfer of employees

[9] Article XII of the collective bargaining agreement provides: The union recognizes that the Company shall have the sole and exclusive jurisdiction of the management and operation of its business, the direction of its workforce, including the assignment of tasks and machines to employees, the right to maintain discipline and efficiency in this plant, the right to promulgate and enforce reasonable working rules, the right to hire, discipline and discharge employees subject to the provisions of this Agreement, the right to establish starting times and quitting times, to establish or discontinue shifts, to assign employees to shifts, and the right to relocate its plant or any portion thereof. It is agreed that the rights enumerated above shall be deemed to exclude preexisting rights of management not herein listed to operate its business in the manner it sees fit, provided that they do not conflict with other provisions of this Agreement.

in unit work from Hollins Ferry Road to Owings Mills. We agree. At the time of Owings Mills' opening it was not a relocation as that term is normally used. It was hoped that the plant would supplement the ongoing operations at Potee Street and Hollins Ferry Road.[10] The accretion occurred September 12, 1977 and the first transfer of employees from Hollins Ferry Road to Owings Mills did not occur until October. Until the decision to close Hollins Ferry Road was made on February 2, 1978, Universal intended to operate — and did operate — all three plants. Thus it is clear that the closing of Hollins Ferry Road was not a pure relocation and was nothing more than a partial closing. In no way can the union be said to have clearly and unmistakably waived its perceived right to demand bargaining over the closing. That the closing of Hollins Ferry Road occurred only a few months after the opening of Owings Mills does not obviate this fact.

In finding that the union had not waived its rights and that Universal had unlawfully failed to bargain over the closing decision, the ALJ ordered Universal to bargain with the union over the decision to close the plant — a decision which was irrevocably made in 1978. Since that time the plant has been abandoned by Universal and its lease on the property has long since expired. Bargaining over the decision to close, therefore, would accomplish nothing for the bargaining unit members. The Board has recognized before that when a plant has already been closed for economic reasons, and a bargaining order would not change that fact, such an order is inappropriate. In *Burroughs Corp.*, 214 NLRB 571 (1974), the employer did not contest a finding that it had violated the Act by failing to bargain over a decision to close, but contested the accompanying bargaining order because its lease had expired and its equipment removed from the plant. The Board refused to order bargaining, saying, "as the plant

[10] Universal's labor counsel, Earle K. Shawe, testified before the ALJ that the Owings Mills plant was to supplement Universal's other plants rather than to serve as a relocation of the Hollins Ferry Road plant.

was closed for economic reasons and has been closed for some time, we do not believe any useful purpose would be served by requiring further bargaining with respect to the decision to close the plant." *Id.* at n.4.

We agree with this conclusion and apply it to this case. No useful purpose could possibly be served by a bargaining order requiring the parties to negotiate a foregone conclusion over three years after the fact.

This decision not to enforce this portion of the order can be said to be putting the cart before the horse since we have not yet settled the question of whether or not a partial closing decision is indeed a mandatory subject of bargaining. We are aware of the Supreme Court's holding in *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488 (1979), in which the Court wrote that the Board's "judgment as to what is a mandatory bargaining subject is entitled to considerable deference." 441 U.S. at 495, and that "the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." 441 U.S. at 497.

In this case, however, since we have specifically rejected the remedy ordered by the Board, we need not make a detailed analysis of the Board's judgment on the closing decision. Furthermore, we are convinced that establishing a rule for this judicial circuit would be of minimal value anyway since the Supreme Court has recently decided to review this issue. *N.L.R.B. v. First National Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980), *cert. granted*, ___ U.S. ___, 49 U.S.L.W. 3481 (January 12, 1981, No. 80-544).

Enforcement of this portion of the order is, therefore, denied.

B. *Closing Effects.*

Although there may be conflicting opinions as to whether an employer has a duty to bargain over a partial closing decision, it is clear that an employer must bargain

with the union over the effects of that decision on the bargaining unit members. *N.L.R.B. v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976). *See also, N.L.R.B. v. Triumph Curing Center*, 571 F.2d 462, 474 n.11 (9th Cir. 1978); *Royal Typewriter Co. v. N.L.R.B.*, 533 F.2d 1030, 1039 (8th Cir. 1976); *International Ladies Garment Workers' Union, AFL-CIO v. N.L.R.B.*, 463 F.2d 907, 917 (D.C. Cir. 1972).

Universal does not question its duty to bargain over the effects of its decision, but challenges the Board's conclusion that it did not bargain in good faith over the effects. The company points to its February 3, 1978 letter to the union inviting it to "discuss all aspects" of the closing, "including, but not limited to, the impact that such a closing would have upon employees at the plant." In that letter to the union it said it intended to offer employment to as many Hollins Ferry Road employees as possible at the new plant.

Several meetings between Universal officials and union representatives were held in February, at which meetings the principal bone of contention was the union's request that the company recognize the union voluntarily as the exclusive bargaining representative of the production and maintenance workers at the Owings Mills plant — a request the company consistently denied. Other specific problems were discussed, although no discussions were held on general problems associated with the transfer, such as severance pay and senicrity questions. Universal claims that it stood willing to discuss these issues but the union never brought them up, thus waiving its right to complain later.

The Board concluded that these meetings were insufficient to satisfy the company's duty because they came too late for effective bargaining to take place. We believe the Board's conclusion is supported by substantial evidence.

The decision to close Hollins Ferry Road was made on February 2, 1978. The letter to union officials, dated

February 3, 1978, stated that it would "probably" be necessary to close the plant "within the next few weeks." Meanwhile, however, the company began to make offers of transfer to the Hollins Ferry Road employees on February 3, 1978 and completed this process in just a few days, well before the first meeting with the union. Following interviews with each employee, Universal's O'Neill asked each employee to sign a form reciting that the employee had been offered a transfer and to fill out whether or not the offer was accepted.

The tansfers began almost immediately. At least some of the former Hollins Ferry Road employees gathered at Owings Mills February 8, 1978, where they were told of the different wages and health benefits there, as well as the change in the seniority status for layoffs. This occurred almost a week before the first meeting with union officials.

In short, the mechanics of the transfer were well in motion by February 14, with many of the areas which could be expected to be bargained over — transfers, wages, seniority, etc. — having already been determined unilaterally.

In *N.L.R.B. v. Katz,* 369 U.S. 736 (1962), the employer had instituted several unilateral changes in mandatory bargaining areas while the matters were under negotiation with the union, with some of the changes being more advantageous to employees than those the employer offered the bargaining representative. In that case the Court wrote:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct the bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance.

369 U.S. at 747.

The Court went on to say that this type of action was "necessarily inconsistent with a sincere desire to conclude an agreement with the union." 369 U.S. at 745.

The Board's policy is that even if the unilateral action is beneficial to the employees the employer is not free to bypass the bargaining representative. *Wellman Indus., Inc.*, 222 NLRB 204 (1976). In that case the Board said that such unilateral action is unlawful because whether or not an offer is beneficial is a matter of opinion, is relative depending upon the employees' alternatives, and places the employer in a position of making choices for employees which are to be made by the bargaining representative. *Id.* at 206.

In light of the sequence of events which occurred even before the first meeting with the union on February 14, it is clear that Universal had unilaterally made choices for its employees which should have been presented to the bargaining representative. The union's position was undercut by the time negotiations began. Universal's actions were clearly contrary to the spirit of the Act and the Board correctly found them to be so.

Universal's claim that by offering employment to the Hollins Ferry Road employees it removed the most central issue from the negotiations misses the point. The Act condemns such unilateral acts. The transfer offers should have been presented to the union to enable the union to negotiate as to the timing and the manner of the transfers, as well as any other effects with which it was concerned.

IV. *UNIVERSAL'S THREATS*

The Board's finding that the company's threats of reprisals if Owings Mills employees sought union representation is clearly supported by substantial evidence. Universal, while citing this as error, does not strenuously argue the point.

Universal's O'Neill warned employee Egitto that if the employees attempted to gain union representation at

Owings Mills, the working conditions at that plant would deteriorate to the level at Hollins Ferry Road. These same comments were substantially repeated to the group of transferees from Hollins Ferry Road who gathered at the Owings Mills plant on February 8, 1978.

Such conduct violates the spirit of the Act, intimidating employees from exercising their right to organize as guaranteed by § 7 of the Act. *N.L.R.B. v. Renner Plumbing, Heating & Air Conditioning, Inc.*, 437 F.2d 893 (4th Cir. 1971). *N.L.R.B. v. Aerovox Corp. of Myrtle Beach, S.C.*, 435 F.2d 1208 (4th Cir. 1970).

Universal does not challenge this legal conclusion. It does however challenge the factual findings by the ALJ and confirmed by the Board, that the O'Neill/Egitto exchange ever took place. O'Neill denied the exchange when he testified.

The ALJ specifically cited the discrepancies in Egitto's and O'Neill's testimony and where they did conflict the ALJ credited Egitto's. He did so based on demeanor and apparent conflicts between O'Neill's testimony and other evidence.

Universal has presented us with no sufficient reason to disturb this finding by the ALJ. The company's claim that O'Neill's testimony is buttressed by the fact that Egitto's was only one of hundreds of conversations O'Neill had with Hollins Ferry Road employees and no other employee testified to a similar conversation, in no way tends to suggest that that particular conversation did not take place. In fact, it could be said that with that many conversations compressed into a relatively short time, O'Neill might tend to forget the details of each one. Universal also says that there was no evidence that the company in any way mistreated its Hollins Ferry Road employees. However, *there was* evidence — evidence which the company does not dispute — that Hollins Ferry Road was inefficient, cold in the winter, hot in the summer, and over-crowded. While these conditions may not constitute

mistreatment, employees transferring to Owings Mills no doubt would prefer more pleasant working conditions.

One of the ALJ's functions is to make factual findings. He did so and his findings are supported by substantial evidence. The fact that he credited one witness over another is no reason to disturb the findings since it is his job to determine what is fact when presented with a conflict.

V. *THE BACK-PAY AWARD*

Universal claims that the portion of the Board's order which requires it to pay back wages to the 29 employees who lost their jobs with the company after declining transfers from Hollins Ferry Road to Owings Mills — which the Board called a "limited" back-pay order — is unwarranted by the facts of the case and punitive in nature.

Before addressing the merits of this issue, however, we must address a procedural matter. The General Counsel for the Board claims that Universal is precluded from challenging this remedy since the company failed to request a reconsideration of the Board's award. It cites the Board's Rules found at 29 CFR § 102.48(d)(1) and (3) for the proposition that a party must move for reconsideration or rehearing when an alleged error arises in the first instance as a result of the Board's decision. Universal having failed to make such a motion, the General Counsel claims the rules bar Universal from objecting on this appeal.

Section 102.48(d)(1) provides:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record as to the Board's decision or order. A motion for reconsideration shall state with particularity the material error claimed. . . .

Section 102.48(d)(3) provides:

> The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

The General Counsel cites *International Ladies Garment Workers' Union, Upper South Department, AFL-CIO v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975), to support this position. In that case the Supreme Court wrote that § 102.48(d)(1) precluded appeal when the Board adopted a theory not previously charged or litigated. The General Counsel also cited *N.L.R.B. v. Erlich's 814, Inc.*, 577 F.2d 68, 69 n.2 (8th Cir. 178); *N.L.R.B. v. STR, Inc.*, 549 F.2d 641 (9th Cir. 1977); *N.L.R.B. v. Allied Products Corp.*, 548 F.2d 644, 652-54 (6th Cir. 1977).

We disagree with the General Counsel's position. The cases he cites are cases in which for some reason the Board issued a decision or an order which did not correspond to the issues and facts fully litigated before it. For instance, in the *STR* case, the court wrote at 642: "The complaint gave the Company more than ample notice that the Board would be examining the circumstances of [the] departure." In the *Allied Products Corp.* case the court wrote:

> Extraordinary circumstances for these purposes exist only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time.

548 F.2d at 654.

It appears clear from these and other cases that the Board regulation is designed for cases in which the Board surprises a party with matters which were not fully presented and litigated before the Board. In a case in which the parties have been made aware that an issue would or could be decided by the Board, and the parties have taken the chance to present their sides of the issue to

the Board and the Board has issued its decision, the failure to request reconsideration under the regulation does not bar the losing party from citing the issue on appeal.

In issuing its back-pay order, the Board did not catch these parties by surprise. The ALJ had previously ordered the company to pay these 29 employees back wages and the company cited this finding in its exceptions to the ALJ's decision. From the record before us it appears clear that the parties fully litigated this issue and the failure on the part of Universal to move for reconsideration by the Board does not preclude it from citing the Board's order on appeal.

Despite specifically finding that Universal did not act discriminatorily towards these employees, the Board issued its "limited" back-pay award to make the employees whole and "in order to recreate in some practical manner the situation in which the parties' bargaining position is not entirely devoid of economic consequences for [Universal]." While the Board enjoys broad discretion in fashioning remedies, *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), and a back-pay award "should stand unless [it is] . . . a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943), its order must be appropriate " 'and shall be adapted to the situation which calls for redress.' " *N.L.R.B. v. District 50, UMW*, 355 U.S. 453 (1958), quoting *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938). *See also, Local 60, United Brotherhood of Carpenters & Joiners of America, AFL-CIO v. N.L.R.B.*, 365 U.S. 651 (1961).

Many of the cases in which the Board has awarded employees back-pay in a partial closing context are cases in which the employees were laid off and given no other employment opportunities by their former employer. *See, e.g., P. B. Mutrie Transportation, Inc.*, 226 NLRB 1325 (1976); *Thompson Transport Co., Inc.*, 184 NLRB 38

(1970); or when the laid off employees were found to have been discriminated against. *Purolator Products, Inc.*, 160 NLRB 80 (1966).

The record in this case discloses that all 29 of these workers were offered transfers to Owings Mills. For reasons of their own, they declined the transfers. After declining, they were put on a preferential hiring list at Potee Street. Furthermore, the Board specifically rejected the ALJ's conclusion that these 29 employees had been unlawfully discriminated against.

Given these facts, we believe a back-pay award is inappropriate in this case. We fully recognize that Universal violated the Act by its failure to bargain over the effects of its closure decision and by offering these transfers unilaterally. However, placing these 29 employees on a preferential hiring list is all that is needed to vindicate the policies of the Act. A back-pay award, in our judgment, is not "adapted to the situation which calls for redress."

We therefore decline to enforce this portion of the Board's order.

VI. *CONCLUSION*

For the reasons stated, therefore, we enforce the Board's order except for those portions which require Universal to bargain with the union over its decision to close the Hollins Ferry Road plant and which would require the company to make a back-pay award to the 29 employees laid off after refusing transfers.

APPENDIX B

In The United States Court of Appeals
for the Fourth Circuit

No. 80-1494

Universal Security Instruments, Inc.,
Petitioner

v.

National Labor Relations Board,
Respondent

and

Industrial Union of Marine and Shipbuilding
Workers of America, AFL-CIO,
Intervenor

ORDER

This Court on May 12, 1981, issued its decision to enforce the order of the National Labor Relations Board excepting only those portions which require the petitioner to bargain with the intervenor over the petitioner's decision to close the Hollins Ferry Road Plant and that portion which requires the company to make a back-pay award to the 29 employees laid off after refusing transfers. The petitioner has made a Motion for Clarification asking that this Court also decline to enforce the portion of the Board's order requiring the payment of union dues by the petitioner to the intervenor. Petitioner's motion is DENIED and it is ORDERED that the Board's order is to be enforced consistently with this Court's decision of May 12, 1981, including that portion of the Board's order which requires payment of union dues for those employees which the Board found had been transferred to the Owings Mills Plant in violation of the National Labor Relations Act. It

is further ORDERED that no union dues need be paid for the 29 employees who declined transfer.

The Clerk is instructed to mail a copy of this order to all counsel of record.

CLEMENT F. HAYNSWORTH, JR.,
Senior Circuit Judge.

JOHN D. BUTZNER, JR.,
Circuit Judge.

RICHARD L. WILLIAMS,
United States District Judge,
Sitting by Designation.

Date: June 17, 1981

APPENDIX C

FPT

250 NLRB No. 92 **D—6602**
Baltimore and Owings Mills, MD

United States of America

Before the National Labor Relations Board

Case 5—CA—9026

Universal Security Instruments, Inc.

and

Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO

DECISION AND ORDER

On August 8, 1979, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering memorandum and a motion to strike certain factual assertions in Respondent's brief.[1]

[1] In fn. 1 of its brief, Respondent states that "between the time of the hearing and the issuance of the Administrative Law Judge's Decision, the Company in fact made offers of employment at its Potee Street plant to each of the 29 employees who had declined offers of employment at Owings Mills." No evidence of such offers was introduced at the hearing in this case.

On October 26, 1979, the General Counsel filed a motion to strike this footnote on grounds that no testimony or exhibits relating to such events were adduced by Respondent during the

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

1. The Administrative Law Judge found, and we agree for the reasons stated by him, that as of September 12, 1977, the employees working at Respondent's newly established plant at Owings Mills, Maryland, constituted an accretion to the existing bargaining unit of production

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hearing, and that, even if that footnote is construed as a post-hearing motion to reopen the record for receipt of new evidence, there is no showing of relevance to the issues herein, which involve Respondent's unlawful conduct vis-a-bis its Owings Mills, Maryland, facility. Inasmuch as Respondent's allegations regarding offers of employment at its Potee Street plant are matters which are properly to be considered at the compliance stage of this proceeding, we make no findings regarding these allegations at this time and thus find it unnecessary to pass upon the General Counsel's motion.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge's Decision at fn. 2 contains an apparently inadvertent error with regard to testimony of Respondent's attorney, Stephen Shawe, as to the date of a conversation between Shawe and the Charging Party's regional director, Earl W. Barnes. That footnote reflects that Shawe testified that the date of the conversation was October 28, 1977. However, the transcript of the hearing shows that Shawe testified that the conversation occurred on September 28, 1977, and we so find.

and maintenance employees at Respondent's plants at Potee Street and on Hollins Ferry Road in Baltimore, Maryland, and that by refusing to recognize the Charging Party, herein also called the Union, as the exclusive collective-bargaining representative of the production and maintenance employees at the Owings Mills plant and to apply the terms of the contract to them, Respondent violated Section 8(a)(5) and (1) of the Act. We also agree with the Administrative Law Judge, for the reasons stated by him, that Respondent violated Section 8(a)(5) and (1) of the Act by its unlawful refusal to bargain over its decision to close the Hollins Ferry Road Plant, the effects of that decision, and the transfer of unit work and employees from Hollins Ferry Road to Owings Mills in October 1977.[3]

In its exceptions to these findings, Respondent claims, *inter alia*, that by virtue of the "management rights" clause of the collective-bargaining agreement between it and the Union,[4] in particular the words "right to relocate

[3] The Administrative Law Judge did not make any findings as to whether Reepondent violated the Act when in February 1978, it offered transfers to the Owings Mills plant to 90-100 Hollins Ferry Road employees, without first consulting and bargaining with the Union. As the issues were fully litigated and the record establishes that these transfers were so made, we find Respondent violated Sec. 8(a)(5) and (1) of the Act by making these transfer offers to its employees without first bargaining with the Union about the matter of the transfers and the employees' attendant rights.

[4] Art. XII of the party's collective-bargaining agreement reads as follows:

> The Union recognizes that the Company shall have the sole and exclusive jurisdiction of the management and operation of its business, the direction of its workforce, including the assignment of tasks and machines to employees, the right to maintain discipline and efficiency in its plant, the right to promulgate and enforce reasonable working rules, the right to hire, discipline and discharge employees subject to the provisions of this Agreement, the right to establish starting times and quitting times, to establish or discontinue shifts, to assign employees to shifts, and the *right to relocate its plant or any portion thereof.* It is agreed that the rights enumerated above shall not be deemed to

its plant or any portion thereof," it was not required to notify or bargain with the Union about the decision to close its Hollins Ferry Road plant, the transfer of unit work to the Owings Mills plant, the offer of transfers to Owings Mills to the employees from Hollins Ferry Road, or the effects of any of those decisions. We disagree and, like the Administrative Law Judge, find that the Union did not waive its right to bargain about any of these matters.

The Act requires that an employer must negotiate with the bargaining representative of its employees, concerning a partial discontinuance or shifting, change, or relocation of its business operations affecting the terms and conditions of employment of unit employees, as well as concerning the effects thereof. While the Board acknowledges that a labor organization may waive the statutory rights granted to it and to the employees it represents, we will not lightly infer such a waiver, which must be in "clear and unmistakable" language.[5]

In the instant case, Respondent opened the Owings Mills operation in September 1977 as an expansion of the Hollins Ferry Road operation. At that time Respondent did not intend to close the latter operation and nothing had been transferred from the older facility to the newer one. Respondent waited until October to unilaterally transfer some employees from Hollins Ferry Road to Owings Mills and then for the express purpose of training new employees and to have experienced personnel at the new plant. In fact, Respondent's attorney, Shawe, testified at the hearing that the Owings Mills plant was intended to supplement Respondent's other plants rather than to serve as the relocation of the Hollins Ferry Road plant. It was not until several months later that Respondent, owing to adverse economic conditions, made the decision to close

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exclude preexisting rights of management not herein listed to operate its business in the manner it sees fit, provided that they do not conflict with other provisions of this Agreement. [Emphasis supplied.]

[5] *Allied Mills Inc.*, 218 NLRB 281, 286 (1975).

the Hollins Ferry Road facility and transfer its operations and employees to Owings Mills. There is nothing in the record, therefore, which shows that this is the type of situation that Respondent and the Union contemplated as being covered by the "relocation" language in the contract.

Our standard in finding a waiver of the employees' statutory rights is a strict one. The word "relocate," which does not definitively cover the situation herein, without more, is not enough to constitute a clear and unequivocal waiver by the Union of its right to bargain with Respondent about the closing of the plant and the transfer of its operations and employees.[6] Accordingly, we find that that section in the parties' contract entitled "Management Rights" cannot be construed as a waiver of the Union's right to bargain about these matters.

2. The Administrative Law Judge found that 29 employees at the Hollins Ferry Road facility who rejected Respondent's offer in February 1978 to transfer to the Owings Mills facility were terminated in violation of Section 8(a)(3) and (1) of the Act. We find merit to Respondent's exception to this finding.

The facts with regard to this issue are as follows:

After opening the Owings Mills facility, Respondent offered transfers to Owings Mills to several Hollins Ferry Road employees in Octover 1977 and February 1978. However, those employees were told that seniority for layoff purposes would be based on their length of employment at the Owings Mills plant. In addition, when offering a transfer to employee Teresa Egitto, Respondent's human relations director, O'Neill, told her that there would be no union at Owings Mills, warned her that if the employees at that facility attempted to organize Respondent would retaliate, and cautioned her that the conversation was

[6] See *The Dow Chemical Company*, 212 NLRB 333, 339 (1974); *R. L. Sweet Lumber Company*, 207 NLRB 529, 538 (1973).

confidential. Finally, at an orientation session of Hollins Ferry Road transferees held on February 8, 1978, in the Owings Mills plant, O'Neill made the statement that the employees at Hollins Ferry Road were treated badly because of the Union's presence there.

The Administrative Law Judge, in addition to finding that the latter two incidents violated Section 8(a)(1) of the Act, a finding which we adopt, found that all these incidents indicated Respondent's union animus, that Respondent seized upon the establishment of its new plant at Owings Mills to rid itself of the Union, and that Respondent insured that the new facility would not be unionized by offering Hollins Ferry Road employees transfers to Owings Mills under discriminatory conditions. Having so found, the Administrative Law Judge concluded "that the employees who rejected O'Neill's offer [to transfer] were in effect discharged because of their adherence or probable adherence to the Union." We disagree.

There is no evidence that Respondent terminated these employees for reasons other than their refusal to accept a transfer to Owings Mills. In addition, there is no evidence that their refusal, as is inferred by the Administrative Law Judge and the General Counsel, was based on any discriminatory condition attached to the transfer or on Respondent's refusal to recognize the Union at Owings Mills. There was no testimony that any of the 29 employees who refused to transfer did so because of seniority considerations. Furthermore, the record is devoid of any showing that the absence of a union at Owings Mills or any other allegedly adverse condition of employment at that plant played a role in any employee's decision to refuse a position at Owings Mills. In fact, not a single employee who declined the offer of a job at Owings Mills testified at the hearing as to the reasons for his or her decision. Thus, the record contains no evidence of these employees' motives in refusing Respondent's offer to transfer. In these circumstances, and contrary to the Administrative Law Judge, we find that the General

Counsel has not established by a preponderance of the evidence that the termination of these employees violated Section 8(a)(3) of the Act.[7]

Remedy

We adopt the remedy recommended by the Administrative Law Judge for Respondent's violations of Section 8(a)(5) of the Act found above. Thus, Respondent shall, *inter alia*, be required to apply the terms of the collective-bargaining agreement between the Union and Respondent to the Owings Mills employees retroactively and make the employees whole for any losses they may have suffered as a result of Respondent's unlawful refusal to extend the terms of the agreement to them. Further, as a result of Respondent's refusal to duscuss with its employees' collec-

[7] The Administrative Law Judge, having found the 8(a)(3) violation, found it unnecessary to determine whether or not Respondent further violated Sec. 8(a)(5) of the Act by the termination of these 29 employees. No exception was taken to his failure to find the latter violation concerning the issue but counsel for the General Counsel in his brief to us urges that such a finding be made. We find no need to pass on this issue, inasmuch as the terminations obviously were an effect of Respondent's decision to close the Hollins Ferry Road plant, and we have found that Respondent violated Sec. 8(a)(5) by refusing to bargain about that decision, its effects, and the transfer of the employees; furthermore, we are ordering, *inter alia*, Respondent to bargain about such matters, and, as part of the remedy for these violations (see *infra*), requiring Respondent to make the employees whole until certain conditions are met.

In the last paragraph of the section of his Decision entitled "Analysis and Conclusions," the Administrative Law Judge found that the transfer offers to Hollins Ferry Road employees in October 1977 and February 1978 were offers of "opportunities to work at Owings Mills under discriminatory conditions" because the employees were told that their seniority for layoff purposes would date from the commencement of their employment at Owings Mills. The Administrative Law Judge further found in his Conclusions of Law, that Respondent violated Sec. 8(a)(3) "by discriminating against its Hollins Ferry Road employees with respect to conditions of employment." Inasmuch as there is no evidence connecting the offers of lesser seniority with the employees' union activity, we do not adopt this finding.

tive-bargaining representative its decision to close the facility where they were employed and the effects of that decision, including the terms of transfer and the like, at least 29 employees lost their jobs and all of the former Hollins Ferry Road employees were denied the service of their collective-bargaining representative at the time when that representative may have been able — had it been afforded the opportunity — to negotiate an agreement with Respondent which could have avoided the shutdown of the Hollins Ferry Road plant or, at the least, would have ameliorated the consequences of the closing vis-a-vis the employees who worked there. In our view, the remedies recommended by the Administrative Law Judge are not sufficient to make the former Hollins Ferry Road employees whole for the losses they have suffered as a result of Respondent's unlawful refusal to bargain. Accordingly, we shall accompany our order to bargain with a limited backpay requirement designed both to make whole the employees for losses suffered as the result of the violation and to recreate in some practical manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for Respondent. For this reason Respondent shall be ordered to pay backpay to the employees employed at the Hollins Ferry Road plant as of February 3, 1978, the date Respondent offered the Hollins Ferry Road employees transfers to Owings Mills, in a manner similar to that required in *P. B. Mutri Motor Transportation*.[8] Thus, backpay shall be computed at the rate of the employees' normal wages when last in Respondent's employ from February 28, 1978, the date on which Respondent closed its Hollins Ferry Road

[8] 226 NLRB 1325 (1976). We recognize that under our Order herein those former Hollins Ferry Road employees who were subsequently employed by Respondent at its other plants are entitled both to the wages, benefits, and other terms and conditions of employment established by the collective-bargaining agreement and backpay as provided herein. To the extent that these two remedies may overlap, the amount of backpay to which individual employees are entitled shall be reduced by the amounts they have earned in Respondent's employ since the closing of the Hollins Ferry Road facility.

facility, until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on employees at its Hollins Ferry Road facility; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts the recommended order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Universal Security Instruments, Inc., Owings Mills, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 1(b):

"(b) Refusing to recognize and bargain in good faith with Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees at its Owings Mills, Maryland, plant of the following appropriate unit:

> All production and maintenance employees employed by Universal Security Instruments, Inc., at its Baltimore, Maryland facilities at 2829 Potee Street, 3341 Hollins Ferry Road, and at its Owings Mills, Mary-

land plant, including custodial and plant clerical employees, but excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act."

2. Delete paragraph 1(d) and reletter subsequent paragraphs accordingly.

3. Substitute the following for paragraph 2(f):

"(f) Pay the unit employees employed at Respondent's Hollins Ferry Road plant as of February 3, 1978, with interest, their normal wages, in the manner and for the period set forth in the section of this Decision entitled 'Remedy.'"

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. July 17, 1980

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain in good faith with Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, concerning our decision and the effects of our decision to terminate our Hollins Ferry Road plant and transfer unit work and employees to our Owings Mills, Maryland, plant and other terms and conditions of employment.

WE WILL NOT refuse to recognize or bargain in good faith with Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate unit which is:

All production and maintenance employees employed by the Employer at its Baltimore, Maryland facilities at 2829 Potee Street, 3341 Hollins Ferry Road, and at its Owings Mills, Maryland plant, including custodial and plant clerical employees, but excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT deal with our employees, individually, who are represented by an exclusive collective-bargaining representative regarding wages, hours, seniority, or other terms and conditions of employment.

WE WILL NOT threaten our employees with economic reprisals because they support and adhere to Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, as their exclusive collec-

tive-bargaining representative or any other labor organization.

WE WILL NOT restrain, coerce, or interfere with our employees' rights under Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees within the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL recognize and upon request bargain with Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the appropriate unit described above.

WE WILL apply the terms of the collective-bargaining agreement to our employees in the appropriate unit working at our Owings Mills, Maryland, plant.

WE WILL make whole those employees at the Owings Mills plant for any loss of benefits they may have suffered by our failure to apply the terms of the collective-bargaining agreement to them.

WE WILL make whole the above-named Union for any moneys that would have been due it under the terms of any checkoff authorization executed by employees which were not deducted and transmitted to the Union as a result of our failure to apply the terms of the collective-bargaining agreement for these employees.

WE WILL, upon request, bargain with Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, concerning our unilateral transfer of our employees from our Hollins Ferry Road plant to our Owings Mills plant, our decision to terminate our Hollins Ferry Road plant the effects of that decision upon employees formerly employed at the plant represented by the above-named Union, including employees' seniority rights, and the transfer of the Hollins Ferry Road plant's production to our Owings

Mills plant, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL, upon request, bargain with the aforesaid Union concerning the seniority of all employees transferred from the Hollins Ferry Road plant to the Owings Mills plant commencing on September 12, 1977, and after such bargaining adjust such employees' seniority in accordance with the agreement reached with the aforesaid Union.

WE WILL pay our employees who were employed at the Hollins Ferry Road plant as of February 3, 1978, with interest, their normal wages in the manner and for the period required by a Decision of the National Labor Relations Board.

UNIVERSAL SECURITY
INSTRUMENTS, INC.

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 West Lombard Street, Ninth Floor, Baltimore, Maryland 21201, Telephone 301-962-2915.

JD-569-79
Baltimore, MD
Owings Mills, MD

United States of America

Before The National Labor Relations Board
Division of Judges

Case No. 5-CA-9026

Universal Security Instruments, Inc.

and

Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO

Roger D. Meade and Paul E. Stanzler, Esq., *of Baltimore, MD, for the General Counsel.*
Warren M. Davison and Leslie R. Stellman, Esqs. (Shawe & Rosenthal), *of Baltimore, MD, for the Respondent.*
Michael Brodie, Esq., *of Philadelphia, PA, for the Charging Party.*

DECISION

Statement of the Case

LEONARD M. WAGMAN, Administrative Law Judge: Upon a charge filed by the Union, Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, the General Counsel of the National Labor Relations Board, by the Regional Director of the Board's Region 5, issued the complaint herein on January 6, 1978, against Respon-

dent, Universal Security Instruments, Inc., alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1)(3) and (5) of the National Labor Relations Act as amended (29 U.S.S. sec. 151, *et seq.*), herein called the Act. Respondent answered, denying commission of the alleged unlawful conduct.

Pursuant to notice, a hearing was held before me at Baltimore, Maryland, on April 10, 11, 12, 27 and 28, 1978. The General Counsel, the Respondent and the Charging Party submitted post-trial briefs. Upon the entire record in this case, consideration of the briefs and my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Respondent, Universal Security Instruments, Inc., a Maryland corporation, manufactures burglar alarms, smoke detectors and other electronic security devices at its Baltimore and Owings Mills, Maryland locations. In connection with its production operations, Respondent annually purchases and receives materials and supplies valued in excess of $50,000 which originate from points outside the State of Maryland. Respondent admits, I find from the foregoing commerce data, that Respondent is an employer engaged in commerce and operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Respondent concedes, and I find, that Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

At all times material, the Union was the recognized exclusive collective bargaining agent for a unit of produc-

tion and maintenance employees at Respondent's two Baltimore plants, located at Potee Street and at Hollins Ferry Road, respectively. The Hollins Ferry Road facility was located approximately 2.7 miles from the Potee Street plant.

In September 1977, Respondent began manufacturing operations at a new plant, situated at Owings Mills, Maryland, approximately 27 miles northwest of the Potee Street and Hollins Ferry Road plants. In February 1978, Respondent closed its Hollins Ferry Road plant permanently. Though requested to do so by the Union, Respondent has refused to bargain with, or recognize, the Union as the exclusive bargaining representative for the Owings Mills production and maintenance employees. Further, in October, 1977 and again in February, 1978 Respondent directly recruited Hollins Ferry plant employees for the Owings Mills plant, without consultation with the Union. Finally, those employees who declined reassignment to Owings Mills in February were placed on a preferential hiring list for the Potee Street facility.

The pleadings present the following issues concerning Respondent's conduct toward the Union and the Hollins Ferry plant employees: (1) Whether Respondent violated Section 8(a)(3) and (1) of the Act by terminating 29 of its Hollins Ferry plant employees because they supported the Union; (2) Whether Respondent violated Section 8(a)(5) and (1) of the Act by attempting to undermine the Union's status as collective bargaining representative by: (a) Unilaterally transferring unit work from the Hollins Ferry plant to the Owings Mills plant; (b) Failing to recognize and bargain with the Union as the exclusive bargaining representative for the Owings Mills production and maintenance employees; (c) Failing to bargain with the Union regarding the transfer of unit work or about the effects of the transfer of unit work to Owings Mills; and by, (d) Terminating 29 of its Hollins Ferry plant employees because they supported the Union.

B. *The Facts*

Except as noted, the facts in this case were not disputed. In January 1973, the Union began organizing Respondent's employees at its then only plant, which it leased, at Potee Street in Baltimore, Maryland. Following a Board-held election, the Union received a Board certification as the exclusive collective-bargaining representative of a unit of Respondent's employees described as follows:

> All production and maintenance employees employed by the [Respondent] at its Baltimore, Maryland facility, including custodial and plant clerical employees, but excluding office clerical employees, guards and supervisors as defined in the Act.

Following the certification, the Union and Respondent negotiated and executed a collective-bargaining agreement, which was effective for a 3 year-term beginning August 1, 1973. The contract's recognition clause limited its application to Respondent's Potee Street plant.

Respondent's production consisted of electro-mechanical and electronic products. Prior to 1973, Respondent produced mostly electro-mechanical sirens, bells and alarms which were based upon a conventional mechanical motor. In 1973, Respondent expanded its electronic production to include smoke detectors and electronic sirens.

In July of 1975, Respondent leased a warehouse facility which became known as the Hollins Ferry Road plant. Respondent converted the warehouse facility to accommodate production of electronic items, with emphasis on smoke detectors.

Respondent began production at Hollins Ferry Road in the Autumn of 1975 with Potee Street employees. Potee Street employees assigned to the new plant reported daily to their Potee Street time clock, and were then transported to the Hollins Ferry Road plant. At the end of the day, Respondent returned those employees to the Potee Street plant where they clocked out for the day.

After one month's operation, Respondent transferred approximately 15 Potee Street employees to Hollins Ferry Road on a permanent basis. Respondent continued to apply the collective-bargaining agreement's union dues checkoff provision to the former Potee Street employees. Respondent filled out its Hollins Ferry Road plant complement with newly hired employees.

In September 1975, Respondent raised the question of a new collective-bargaining agreement for both of its plants. Following negotiations in January and March 1976, the parties on May 17, 1976, executed a memorandum agreement. This agreement modified the original collective-bargaining agreement and extended recognition of the Union to the Hollins Ferry Road production and maintenance employees. Respondent extended recognition without requiring any proof that a majority of the Hollins Ferry Road employees supported the Union. The parties also extended the contract's term to August 1, 1979.

Thereafter, the Respondent and the Union entered into a complete collective-bargaining agreement, also effective from May 17, 1976 until August 1, 1979. By Article I, Section 1 of that contract, Respondent again agreed to recognize the Union as:

> ". . . exclusive bargaining agent for all production and maintenance employees employed by the [Respondent] at its Baltimore, Maryland facilities, at 2829 Potee Street, and 3341 Hollins Ferry Road, including custodial and plant clerical employees but excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the National Labor Relations Act." This last agreement was in effect at all times material to the alleged unlawful conduct.

During the latter half of 1976, the original 40 employee complement at Hollins Ferry Road steadily increased along with production of smoke detectors. In the Autumn of 1976, the Hollins Ferry Road plant employed from 75 to 100 employees. Later, near the end of 1976, when

Respondent began its second shift, there were 100 to 125 employees at the Hollins Ferry Road plant. By spring and summer of 1977, that number had increased to 300 of which 90 percent engaged in producing smoke detectors. Potee Street employed between 50 and 60 plant employees during 1976 and 1977.

Along with the growing employment level, Respondent became increasingly displeased with the Hollins Ferry Road facility. The ceilings were too high. Temperature and humidity could not be adequately controlled and the employees were over-crowded. The Hollins Ferry Road facility was too hot in the summer and too cold in the winter. There was inadequate space for Respondent's production operations. State and local authorities complained to Respondent about fire hazards and inadequate sanitation.

These conditions impaired plant operations. The overcrowded conditions in the plant production area caused Respondent to move its research and quality control activities to a trailer. Further, these shortcomings caused poor productivity and poor product quality at the Hollins Ferry Road plant.

A few months after leasing the Hollins Ferry Road plant, Respondent began looking for a new permanent plant site. Respondent was motivated by a desire to obtain "long term stability" in the growing business attributable to its smoke detector product.

Respondent considered a site at Cockeysville, Maryland, a Baltimore suburb. Respondent rejected that location because it was not served by public transportation to and from Baltimore City. Respondent viewed such transportation as necessary to attract a labor force. Respondent noted that a public bus originating in the City of Baltimore and running past Respondent's Potee Street plant, terminated within walking distance of the Owings Mills plant.

By August 1976, Respondent had located a suitable facility at Owings Mills, Maryland, situated approximately 27 miles northwest of the Potee Street and Hollins Ferry Road plants. Respondent executed a lease-purchase agreement for the Owings Mills site on August 10, 1976.

In a press release dated March 18, 1977, Respondent announced: "[T]hat its acquisition of a 36,000 sq. ft. facility in Baltimore County, Maryland is expected to be completed shortly. The new facility will be used initially to manufacture and warehouse smoke detectors." Ten days after the press release, Respondent purchased the Owings Mills plant.

Chairman Stephen Knepper of Respondent's board of directors testified that:

> Owings Mills was a permanent home for the Company. It was going to produce smoke detectors, as well as other products. The difference in cost between that and Hollins Ferry didn't mean much to me. I mean, I knew that it was less. But that didn't mean much to me, because combined productions, (sic) from both facilities was what we were interested in. . . .

Respondent's new acquisition received additional publicity in a local publication. On May 19, 1977, Baltimore's *North West Star* reported that the Baltimore County Council had "approved a loan for Universal Security Instruments, Inc., to purchase and equip a factory on South Dolfield Road in Owings Mills. . . ."

Late in July 1977, Dow Jones' weekly financial newspaper, *Barron's* carried an article regarding Respondent's business activities, including the report that Respondent had "announced that it has completed the acquisition of its new facility in Owings Mills, Maryland." The article also declared: "Production at the new facility is expected to start September 1977. . . ."

Respondent's annual report to its stockholders, issued in August 1977, contained a photograph captioned "The

Company's new facility, Owings Mills, Maryland." The report also declared:

> "On May 31, 1977, USI acquired a new facility in Baltimore County, Maryland. The facility's approximately 43,000 square feet, on 4.45 acres of land, will help meet the Company's need for space, particularly for the manufacture, assembling and warehousing of smoke detectors. This building represents the largest single physical expansion in the Company's history."

Respondent did not notify the Union regarding the Owings Mills plant. However, the Union became aware of the Owings Mills plant in July 1977. Employee Alice Smith, who was a union shop steward at the Hollins Ferry plant, while visiting Respondent's Potee Street corporate headquarters asked Chairman Knepper: "Are we going to Owings Mills?" Knepper asked her to repeat her question. She responded: "Is the Union going to Owings Mills?" Knepper did not provide the requested information. He directed Smith to Respondent's Director of Human Relations, Robert O'Neill.

Smith soon found O'Neill, in his Potee Street office, and asked: "When are we going to Owings Mills?" O'Neill replied, "I don't know."

In late July or early August, employee Veronica Atkinson, a shop steward at the Potee Street plant, gave the Union's Regional Director, Earl W. Barnes one of the cardboard containers used to package Respondent's smoke detectors. The container gave Respondent's address as:

> 10324 South Dolfield Road
> Owings Mills, Maryland 21117 U.S.A.

Barnes went to the address given on the carton and saw Respondent's new plant. Thereafter, Barnes accompanied by his staff representative, Tom D'Amico made three more exploratory visits to the Owings Mills site.

The Owings Mills plant commenced operations on September 12, 1977. Thus, in September 1977 Respondent

was producing smoke detectors both at the Hollins Ferry Road plant, where it had extended its lease for 6 months beginning September 1, 1977, and at Owings Mills. I find from Chairman Knepper's testimony that when Respondent began operations at Owings Mills, its intention was to use the new plant to expand its production of smoke detectors.

In August and September 1977, Respondent placed help-wanted advertisements in two suburban Baltimore newspaper and in the *Baltimore-Sun*. The advertisements, composed and placed by Respondent's Human Relations Director O'Neill, stated that an unnamed manufacturer wanted help at an Owings Mills plant at "10324 South Dolefield Road." They described the work as "factory work" and declared:

> Prior experience preferred but not necessary.
> Individual must possess a high degree of manual dexterity.

By the end of September 1977, Owings Mills employed 65 factory employees and supervisory and managerial employees. Of the supervisory and management group 1 or 2 had been supervisors at Hollins Ferry Road. Respondent had recruited the remaining supervisory and managerial personnel in August 1977, and had trained them at Hollins Ferry Road.

On or about September 12, the Union's Regional Director Earl W. Barnes, in the company of his staff representative, Tom D'Amico, visited the Owings Mills plant, where they encountered Respondent's Director of Operations Amedee Dean.[1] Barnes asked Dean whether Respondent would recognize the Union as exclusive bargaining representative for the Owings Mills plant. Dean asked the two union representatives to leave the premises. Again, Barnes asked if Respondent would recognize the Union at Owings Mills. Dean replied, "I can't answer that.

[1] At the time of the hearing Dean was vice president in charge of manufacturing.

You'll have to talk to Bob O'Neill." Dean then told the two union officials to leave. Barnes and D'Amico subsequently returned to the Owings Mills plant where they distributed handbills and information regarding the Union to the employees.

Soon after his encounter with Amedee Dean, Barnes asked Human Relations Director O'Neill if Respondent would recognize the Union at the Owings Mills plant. O'Neill advised Barnes to take the matter up with Respondent's labor counsel, Stephen Shawe.

In conversation with Barnes on September 28, 1977, Attorney Stephen Shawe, on Respondent's behalf, refused to recognize and bargain with the Union for the Owings Mills plant employees.[2] Barnes stated that absent recognition, the Union intended to organize the Owings Mills facility. Barnes also pointed out that a considerable number of Respondent's employees were interested in being represented by the International Brotherhood of Electrical Workers and that "the Company would be better off without" that union at Owings Mills. Barnes asked about Respondent's intentions regarding its Hollins Ferry Road plant. In response, Shawe "explained that it was [Respondents] intention to operate the Hollins Ferry facility, and that the Owings Mills facility was a supplement to the Company's other production facilities."

The Union made one further attempt to obtain recognition at the Owings Mills plant. By letter dated December 21, 1977, the Union's attorney, Michael Brodie, requested that Respondent recognize and bargain with the Union as

[2] Barnes testified that this conversation occurred on October 28, 1977. However, he seemed uncertain about that date and the dates about which he testified. Attorney Shawe's testimony found support in his regularly kept daily telephone log for October 28, 1977. Further, unlike Barnes who provided scant details, Shawe appeared to be giving his full recollection of the conversation, which he provided in a forthright manner. Accordingly, I have based my findings regarding this conversation upon Shawe's testimony.

the exclusive representative of the Owings Mills production and maintenance employees. By letter dated January 3, 1978, Respondent's counsel rejected that request.

In early October 1977, Chairman Knepper recognized the need for a cadre of trained employees at Owings Mills. He immediately authorized O'Neill to recruit a number of employees at Hollins Ferry Road for permanent transfer to Owings Mills. Respondent did not notify the Union of its plans to transfer Hollins Ferry employees to Owings Mills. O'Neill did not recruit on the basis of seniority. Using recommendations from production management, O'Neill selectively interviewed four employees for voluntary transfers to Owings Mills. Of that number, 3 agreed to transfer. Later in the month, O'Neill spoke individually to additional employees to whom he offered involuntary transfers. Twelve agreed to transfer. Again, seniority was not a factor. Those who declined transfer were laid off due to adverse business conditions. By the end of October, Owings Mills had 80 production and maintenance employees. At the same time, Hollins Ferry Road employed approximately 200 plant production and maintenance employees. Potee Street employed approximately 50.

Among those offered involuntary transfer was Teresa Egitto. On October 26, O'Neill informed Egitto that she had been laid off, but could be rehired at the Owings Mills plant. Egitto replied that she had to think about the offer because she had "a transportation problem." O'Neill assured her that she would be performing the same type of work that she was presently doing at Hollins Ferry Road. O'Neill advised her that there was no union at Owings Mills and that the employment benefits there were better. O'Neill warned that if the Owings Mills employees attempted to obtain union representation, Respondent would retaliate by treating the employees just as poorly as they had been treated at the Hollins Ferry Road plant.[3] It

[3] Whenever there was a conflict in their testimony, my finding regarding Egitto's interview with O'Neill and his remarks to her following her transfer were based upon her testimony. Egitto delivered her testimony in a full and forth-

is undisputed that he cautioned Egitto that their conversation was confidential. I find from Respondent's records and Egitto's testimony that she accepted the offer of reemployment, and reported to Owings Mills on October 28.

Immediately, Respondent assigned Egitto to working on smoke detectors, checking the radium sources which activate the instruments. Respondent produced similar smoke detectors at the Hollins Ferry Road plant.

On the afternoon of the same day, O'Neill met with Egitto and two other employees at the Owings Mills plant cafeteria. O'Neill asked the employees for their impression of the new plant and told them of the employment benefits available to them. O'Neill advised the three employees that with respect to vacations and other benefits, they had retained company seniority superior to that of the new employees at Owings Mills.[4] However, for purposes of

right manner. In assessing Egitto's testimony I have also taken into account her dispute with Respondent following her transfer to Owings Mills regarding a wage increase. However, notwithstanding that fact, I did not detect in her testimony any attempt to embellish or exaggerate her account of O'Neill's remarks and her treatment at Respondent's hands. My doubts about O'Neill's reliability arose first from the conflict between his testimony that Egitto's October 28 transfer was voluntary and his later testimony that the voluntary transfers were limited to early October and that at least some transfers in late October were involuntary due to business conditions. In light of the timing of Egitto's transfer so close to a mass layoff on October 31, it seemed likely that her transfer would have been involuntary. Further in contrast to Egitto, O'Neill did not provide a full account of the interview and his remarks on October 28 at Owings Mills. Instead, he generally provided exculpatory negative responses to carefully fashioned leading questions posed by counsel for Respondent, or could not remember. (See TR. 651-654.)

[4] Respondent's contract with the Union, in effect at all times material to this case, contained the following pertinent provisions regarding seniority and layoffs:

ARTICLE XI
SENIORITY AND LAYOFF
PROCEDURES

Section 1. Seniority under this Agreement shall be plant-wide; that is based upon length of service with the

layoff, the plant seniority of the Owings Mills employees hired before Egitto and the two employees would take precedence. O'Neill added that Respondent did not need a union at Owings Mills, could offer the employees more benefits without the Union, and didn't need a third party to engage in bargaining.

On October 31, 1977, problems with the radium sources used in its smoke detectors, reduced demand for smoke detectors, and a longshoremen's strike caused Respondent to lay off all of its Owings Mills production and maintenance employees, and all but 50 of its Hollins Ferry plant employees. At the time of the layoff, Hollins Ferry had about 200 employees, Owings Mills had about 80 and Potee Street had 50. The layoff included all of the Owings Mills employees and 150 of the Hollins Ferry employees. Respondent terminated the layoff in January 1978 when it recalled all of the laid-off employees.

However, reduced demand pressured Respondent into sharply reducing the price of its smoke detectors to distributors. This development combined with the inefficiency of the Hollins Ferry plant, rendered smoke detector production unprofitable at that facility.

Toward the end of January 1978, Director of Operations Amedee Dean and Chairman Stephen Knepper discussed the Hollins Ferry Road plant's viability. On or about February 1, 1978 Dean recommended the termination of production at Hollins Ferry Road. On February 2, Chairman Knepper decided to terminate the Hollins Ferry Road plant operations by the month's end. The next day,

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Company, with exception outlined hereinafter in this Article.

* * * * * *

Section 5. In recognition of the different training and skills necessary to perform the work in the electronics department and in the electro-mechanical department, layoffs and recalls in those two departments shall be based upon departmental seniority and not on plant seniority.

. . .

Knepper notified Director of Human Relations O'Neill of the decision and authorized him to offer Hollins Ferry employees the option of transfer to the Owings Mills plant. That same day, Respondent's counsel by letter advised the Union that:

> Because of pressing economic circumstances, it will probably be necessary for the Company to close its Hollins Ferry Road, Baltimore, plant within the next few weeks. That plant is very inefficient and the Company's costs are unduly high. Since your Union represents the production and maintenance employees at this plant, the Company is hereby offering to meet with you, at a mutually convenient time and place, to discuss all aspects of this matter, including, but not limited to, the impact that such a closing would have upon the employees at that plant. It is our intention to offer employment to as many of the Hollins Ferry Road plant employees as possible at our new facility in Owings Mills, Maryland.
>
> I look forward to hearing from you at your earliest convenience to arrange such a meeting.

On February 3, Human Relations Director O'Neill began offering transfers to the 90 to 100 Hollins Ferry plant employees. O'Neill spoke to the most senior employees first, using a plant seniority list. If an employee refused reassignment, O'Neill reminded the employee that Respondent intended to close the Hollins Ferry plant "within a few weeks." He also warned that he could not assure them employment at Potee Street.

Thirty-one employees refused reassignment. Seventy-two accepted reassignment to Owings Mills. Following an interview with O'Neill, each employee was asked to sign a form reciting that he or she had received an offer of transfer to Respondent's Owings Mills plant. Below that sentence, the employee had the option of checking either "I accept reassignment" or "I decline reassignment." Respondent transferred all those who wished transfers to the Owings Mills plant. None of the transferees suffered a loss of pay. Some received wage increases. Except for two

employees, who accepted offers of transfer to Potee Street. Respondent placed the remaining 29 employees, who had declined transfer to Owings Mills, on a preferential hiring list for Potee Street.

On the morning of February 8, approximately 10 Hollins Ferry Road transferees assembled in the Owings Mills plant's cafeteria where Human Relations Director O'Neill presented each with a company handbook and then provided time for reading the booklet. After the employees had completed their review of the handbook, O'Neill joined them for a general discussion.

O'Neill advised the employees of their new health benefits and wage improvements, none of which were under the Union's contract. Under the Owings Mills health benefit arrangement, an employee would enjoy benefits after 6 months' employment. The Hollins Ferry Road collective-bargaining agreement required one year's employment. O'Neill also compared wages at the two plants. He pointed out that the hiring in wage at both plants was the same. However, Owings Mills employees received their first wage increase after a 60-day probationary period. Under the union contract covering Hollins Ferry Road, an employee received the first wage increase after 6 months. Respondent granted most transferees a wage increase immediately.

The employees asked about seniority, O'Neill assured them that for purposes of vacation and other fringe benefits, the Hollins Ferry employees would retain their company seniority. However, in determining the order of layoffs, Respondent would consider plant seniority. Thus, for purposes of layoff, the date of hiring at the Owings Mills plant would be determinative.

The employees asked about seniority; O'Neill assured at the Owings Mills plant, O'Neill assured them that the conditions were better. He also pointed out that the Respondent treated employees like animals at the Hollins Ferry Road plant, but would no longer do so at Owings

Mills. Employee Martha J. Smith asked why Respondent treated them "like animals" at Hollins Ferry Road. O'Neill explained that it was because they had a union.[5] O'Neill pointed out that if employees had any grievance that they

[5] O'Neill denied telling the employees that for layoff purposes their seniority was less than that of earlier hired Owings Mills employees. He also denied making any reference to the Union in his remarks about the treatment accorded employees at the Hollins Ferry Road plant. O'Neill conceded that he told the employees on February 8 "that at Hollins Ferry they were herded around like animals." O'Neill also testified that he remembered that someone asked him if Owings Mills was a union plant. He testified that his answer was "no, it's not a union plant." He also admitted that there was a discussion about seniority and that he merely explained the difference between plant seniority and company seniority, when asked. He denied telling the employees that they would not be treated like animals at Owings Mills because there was no union there.

However, my earlier stated doubt as to his reliability increased due to his gratuitous attempts to protect the Respondent. At the trial O'Neill attempted to downgrade the employees' testimony by volunteering that they took his remarks out of context. I also noted that when questioned as to why, after the instant trial had begun, he had interrogated employee participants in the February 8 meeting regarding his remarks, he came up with the expedient response that he was part of the Respondent's "defense teams." In contrast, I was impressed that employee Martha J. Smith was a forthright witness, who appeared unconcerned about the outcome of this case. I have considered Martha J. Smith's recent disputes with Respondent involving her reinstatement following arbitration proceedings and the backpay resulting from the arbitrator's award. I also noted, however, that at the time she testified, Smith was an employee at Owings Mills plant. Thus, she was not likely to fabricate her testimony if she wished to remain employed at Owings Mills. Furthermore, O'Neill and other employees who were present at the meeting confirmed substantial portions of her testimony. In an attempt to bolster O'Neill's testimony, Respondent introduced the testimony of other employees who were present at the meeting. However, none of these employee witnesses appeared to have much recollection of what O'Neill said and in one instance contradicted his admission that he said Owings Mills was a nonunion plant. I have therefore credited Martha J. Smith's version of O'Neill's remarks of February 8, 1978.

should go to their immediate supervisor with the problem. If they were not satisfied with the initial response, they would then take the matter up with the plant manager. The third step of their grievance procedure would be with O'Neill, himself. O'Neill also stated "that there was no longer a third party in between myself and them, that they were now independent contractors, and that they dealt directly with the company on their own behalf." O'Neill gave the same orientation to 10 or 15 groups of transferees through February and during March.

On February 14, Union Regional Director Barnes attended a meeting with Respondent's attorneys Stephen Shawe, and Warren Davison and Human Relations Director O'Neill. Shawe announced that Respondent was closing the Hollins Ferry Road facility. Shawe added that the Hollins Ferry Road activities would be moved to Owings Mills and that Respondent was offering transfers to that facility to all of the Hollins Ferry Road employees. Shawe stated that the new Owings Mills facility would accommodate all of the electronics division production. Potee Street would continue as it had been.

Respondent closed the Hollins Ferry Road plant on February 28, 1978. To date, Respondent has not recognized the Union as exclusive bargaining representative of the Owings Mills production and maintenance employees. Aside from discussions involving five Hollins Ferry Road plant employees, Respondent did not deal further with the Union regarding the Hollins Ferry Road plant's closing or effects upon employees.

C. *Analysis and Conclusions*

The General Counsel and the Union contend that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to extend the collective-bargaining agreement covering the Potee Street and the Hollins Ferry Road plants to the Owings Mills plant, as requested by the Union in September 1977. As ground for their contention, the General Counsel and the Union urge that the Owings

Mills plant was an accretion to the existing bargaining unit. Respondent argues that it had no such obligation, on the ground that the Owings Mills plant was not an accretion to the existing unit. For reasons stated below, I find that Respondent's refusal to extend the contract covering Potee Street and Hollins Ferry Road plant to Owings Mills was an unlawful refusal to recognize and bargain with the Union.

It is well settled that where an employer establishes a new operation which constitutes an accretion to an existing bargaining unit, the employer's refusal to include the new operation in the bargaining unit upon the bargaining representative's request is a violation of Section 8(a)(5) and (1) of the Act. *Goodyear Tire & Rubber Company*, 195 NLRB 767, 769-770 (1972). Here, I find the Union made such a request on or about September 12, 1977, when Owings Mills began operations. Thus, the issue in this case turns on whether the Owings Mills plant was an accretion at the time of the Union's request, or a separate independent unit. The determination of whether the Owings Mills plant was an accretion requires careful consideration of its circumstance. Thus, in the words of an earlier writer, which the Board approved:

> "Whether or not a particular operation constitutes an accretion or a separate unit turns, of course, on the entire congeries of facts in each case. In determining that a newly established facility or operation is an accretion to an existing unit, the Board has given weight to a variety of factors such as integration of the operations; centralization of managerial and administrative control; geographic proximity; similarity of working conditions, skills, and functions; having control over labor relations; collective bargaining history; and interchangeability of employees." *The Great A & P Tea Co., (Family Savings Center)* 140 NLRB 1011, 1021 (1963).

Examining the circumstances in the instant case, I find that the balance of factors support a finding of accretion at the time the Union requested extension of the contract to

the new Owings Mills plant. First, I note that, according to Chairman Knepper's testimony, Respondent established Owings Mills to augment Hollins Ferry Road's production of smoke detectors. Further, Respondent's counsel told the Union on September 28, 1977, that Owings Mills was a supplement to Hollins Ferry Road plant. Both plants produced Respondent's SS-200 model until the October 31 layoff.

A further factor was the similarity of skills required at both Hollins Ferry and Owings Mills. In October 1977, Respondent transferred 15 Hollins Ferry Road employees to Owings Mills. The stated purpose of these transfers was to provide a cadre of experienced employees to assist production and to train newly hired employees. In February, 1978 when Respondent decided to close the Hollins Ferry Road plant it extended an offer of employment to all the unit employees at Hollins Ferry Road without requiring additional training. Thus I find that the employees of two plants were substantially interchangeable.

Respondent's three plants drew their employees from the same metropolitan Baltimore labor market. In hiring employees for Owings Mills, Respondent placed want ads in suburban Baltimore papers as well as in a Baltimore city paper, the *Sun*. Chairman Knepper also chose Owings Mills because of its proximity to a Baltimore city bus line, which also ran past the Potee Street plant. Owings Mills was about 27 miles from both the Potee Street and Hollins Ferry Road plants.

Chairman Knepper, President Michael Kovens, Director of Operations Amedee Dean and Director of Human Relations Robert O'Neill exercised centralized control over the three plants. Knepper was in charge of marketing, finance and administration. Kovens oversaw engineering and new product development. Dean maintained operational control of production. His duties required that he maintain an office in each plant. Dean also established the qualifications for the new hires at Owings Mills. Robert O'Neill Respondent's Director of Human Relations also

participated in the operation of Owings Mills. He handled the hiring of new employees at Owings Mills in September 1977. In October 1977, O'Neill interviewed and transferred employees from Hollins Ferry to Owings Mills. At all times material O'Neill carried out Respondent's policies regarding hiring, firing, employee relations, and its relations with governmental agencies on a corporate-wide basis.

Respondent's managerial and staff activities concerning engineering, quality control, maintenance, payroll, personnel, purchasing and manufacturing were at all times material performed on a corporate-wide basis. Further, these activities were centrally controlled. Prior to December 1977, the officers and management personnel responsible for these corporate functions were housed at the Respondent's Potee Street plant. After December, Respondent transferred its corporate headquarters to the Owings Mills plant.

In light of the foregoing factors, I find that on or about September 12, 1977, and thereafter, the Owings Mills plant was an accretion to the existing unit. Thus, when the Union requested extension of the existing collective-bargaining agreement to the Owings Mills operation, Respondent's refusal constituted a violation of Section 8(a)(5) and (1) of the Act.

I find no merit in Respondent's suggestion that the 1976 contract's recognition clause, which limited recognition of the Union to the Baltimore, Maryland, facilities at Potee Street and Hollins Ferry Road, precluded the Union from demanding extension of the contract to Owings Mills. The place designations stated in Article I of the 1976 agreement merely defined the extent of the unit as it existed at the time the agreement was executed. I find and conclude that by that language the Union did not waive its right to extend the contract to an accretion. *Robertshaw Controls Co.*, 240 NLRB No. 188, JD at page 7.

The complaint alleged that Respondent further violated Section 8(a)(5) and (1) of the Act by failing to meet and bargain with the Union concerning Respondent's decisions to terminate the Hollins Ferry Road facility, and the effects of the transfer of the Hollins Ferry Road plant's portion of smoke detector production to Owings Mills. Respondent contends that it was under no obligation to bargain concerning the decision to terminate the Hollins Ferry Road plant. Respondent also argues that it has satisfied the statutory obligation to bargain about the effects of the closing at Hollins Ferry Road. I disagree with Respondent's positions.

There is ample authority showing that "the Board appears consistently to have adhered to the principle that an employer must bargain with employees concerning a partial discontinuance or shifting, change, or relocation of its business operations effecting the terms and conditions of unit employees, as well as concerning the effects thereof." *Burroughs Corporation*, 214 NLRB 571, 579 (1974) Accord: *First National Maintenance Corp.*, 242 NLRB No. 72 (1979). Here, on February 2, 1978, Respondent decided to terminate its Hollins Ferry Road operation. Then, on February 3, one day after the decision was made, Human Relations Director O'Neill began to recruit, on an individual basis, the 90 to 100 employees then working at Hollins Ferry Road for transfer to Owings Mills. This project required 2 to 3 days to complete. Respondent failed to give the Union adequate notice. For, on the very day that O'Neill began transfer interviews, Respondent told the Union only that closure of Hollins Ferry was a probability "within the next few weeks." There was no indication that Respondent was in fact carrying out its decision. Even assuming that Respondent's message was designed to stimulate the Union's concern, Respondent did not provide the Union with ample time to seek bargaining about the decision made only one day before the letter was written. Here, the Respondent's decision to terminate the Hollins Ferry Road plant was not communicated to the Union until it had almost become a

fait accompli. Good faith bargaining required Respondent to provide the Union with notification of its plans before the machinery for their accomplishment had become active. This, Respondent did not do.

The Respondent's obligation was not satisfied by the meeting of February 14 and subsequent meetings with union representatives at which transfers of five Hollins Ferry Road plant employees were discussed. Those meetings came too late. Respondent had already disposed of 90 or more Hollins Ferry Road plant employees and had decided to close that plant. In short the Union had insufficient warning to exercise its right to request bargaining about the closing and its effects on the bargaining unit. I find therefore that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning the termination of Hollins Ferry Road, the transfer of the production operations of that plant to the Owings Mills plant, and the effect of that closing upon the unit employees both at Owings Mills and at Hollins Ferry.

Respondent retained the right under the contract "to relocate its plant or any portion thereof." However, contrary to Respondent's urging, I find that the Union did not by that language bargain away its right to bargain about plant termination, or the transfer of unit work from one plant to another.

Likewise, by proceeding unilaterally, without notice to the Union, Respondent again violated Section 8(a)(5) and (1) of the Act when it transferred 15 employees from Hollins Ferry Road to Owings Mills in October 1977. Those tranfers involved changed terms and conditions of employment of bargaining unit employees such as health benefits, wages and seniority about which the Union was entitled to be consulted prior to their implementation. *N.L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Inc.*, 369 U.S. 736 (1962); *Wellman Industries, Inc.*, 222 NLRB 204, 206 (1976). Here, Respondent gave the Union no notice at all. Instead, Respondent recruited

unit employees for transfer to Owings Mills individually, without regard to the Union.[6]

Finally, the complaint alleged that Respondent violated Section 8(a)(3) and (1) of the Act by terminating 29 Hollins Ferry Road employees in February because of their support for the Union. Respondent denies committing such discrimination and urges that there is no showing of union animus to support the complaint. However, I find that Respondent by its treatment of the 29 Hollins Ferry employees in February 1978 terminated them in an effort to weaken the Union's support among the Owings Mills plant employees.

Contrary to Respondent, I find ample evidence of its union animus. In October 1977, O'Neill warned employee Egitto that if the Owings Mills employees sought union representation, they could expect the same harsh treatment they had received at Hollins Ferry. Although not alleged in the complaint, I find O'Neill's remark constituted a threat of reprisal violative of Section 8(a)(1) of the Act. I also find violative of Section 8(a)(1) of the Act, and indicative of Respondent's union animus, O'Neill's remarks to the same effect in February, when he told the employees in the Owings Mills cafeteria that they had been treated like animals at the Hollins Ferry Road plant because there was a union representing them.[7] This remark carried the implication that if the employees sought and obtained union representation at Owings Mills, Respondent would again treat them harshly.

Further evidence of Respondent's animus was its repeated violations of its obligation to bargain with the Union.

[6] The complaint did not specifically allege that the October 1977 unilateral transfers violated Section 8(a)(5) and (1) of the Act. However, as the underlying facts were fully litigated, Board law permits me to make such a finding. *Keystone Pretzel Bakery, Inc.*, 242 NLRB No. 77, n. 2 (1979).

[7] These remarks were not alleged as violations in the complaint. However, as the October and February warnings were fully litigated, they may properly be found to be violations of the Act. *Keystone Pretzel Bakery, Inc., supra.*

Such evidence of animus belies Chairman Knepper's testimony that when contemplating the transfer of employees to Owings Mills and the establishment of Owings Mills, Respondent gave no thought to the Union. Although it is not shown that Respondent's motivation in opening Owings Mills and closing Hollins Ferry was a desire to dislodge the Union, I nevertheless find that Respondent seized upon these events as an opportunity to rid its smoke detector operations of the burden of collective bargaining with the Union.

I also find that Respondent in dealing with Hollins Ferry bargaining unit employees offered them opportunities to work at Owings Mills under discriminatory conditions. Thus, in October, 1977 and February 1978, the transferees from Hollins Ferry to Owings Mills received less job security than the newly hired Owings Mills employees. Thus, as is found above, Respondent notified the transferees that they would enjoy company seniority with respect to their wages and fringe benefits but would only be accorded plant seniority with respect to layoff. In light of Respondent's desire to maintain Owings Mills free of union representation, and O'Neill's threats, the reduced seniority accorded Hollins Ferry transferees appear to be part of a plan to keep the Owings Mills plant free of the Union. I find therefore that the employees who rejected O'Neill's offer were in effect discharged because of their adherence or probable adherence to the Union. Accordingly, I find that the 29 employees whose names are set forth below in Appendix "A" were terminated in violation of Section 8(a)(3) and (1) of the Act.[7a]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

[7a] I find it unnecessary to determine whether Respondent further violated Section 8(a)(5) of the Act by the discriminatory terminations and shall recommend dismissal of the pertinent allegation in the complaint.

2. Industrial Union of Marine & Shipbuilding Workers of America AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Respondent at its Baltimore, Maryland facilities at 2829 Potee Street, 3341 Hollins Ferry Road, and at its Owings Mills, Maryland plant, including custodial and plant clerical employees, but excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 8(a)(5) and 9(b) of the Act.

4. By failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative for the production and maintenance employees at its Owings Mills plant, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By unilaterally, and without notice to or consultation with the Union, transferring unit work from its Hollins Ferry Road plant to its Owings Mills plant, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing to bargain with the Union over the effects of transferring said unit work to the Owings Mills facility and by failing to consult with and bargain with the Union regarding the transfer of Hollins Ferry plant employees to the Owings Mills plant, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By discriminating against its Hollins Ferry Road employees with respect to conditions of employment and by terminating Hollins Ferry Road employees, thereby discouraging membership in the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

8. By threatening employees with reprisals if they selected a union as the collective-bargaining representative, Respondent restrained, coerced and interfered with

employees in the enjoyment of their rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not otherwise violated the Act.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Respondent violated Section 8(a)(5) and (1) of the Act, by refusing to bargain about its decision to close the Hollins Ferry plant and the effects thereof, I shall recommend that Respondent be required, upon request, to bargain collectively with the Union concerning the decision and the effects upon the unit employees of the closure and the transfer of work from the Hollins Ferry Road plant to the Owings Mills plant, particularly with respect to the transfer of such employees and their seniority. I shall also recommend that Respondent be required to recognize and bargain collectively with the Union concerning wages, hours and conditions of employment of the Owings Mills plant employees and that Respondent be required to extend the collective-bargaining agreement currently covering its Potee Street employees to the Owings Mills plant employees. I shall also recommend retroactive application of the collective-bargaining agreement covering the Potee Street and Hollins Ferry Road plant to the Owings Mills plant as of September 1977 or such other date as may be determined as the date upon which the union requested recognition, bargaining and extension of the contract to the Owings Mills plant. Thus, I shall require Respondent to make employees whole for any loss of benefits which would have accrued to them under the terms and conditions of

employment set forth in the collective-bargaining agreement covering the bargaining unit. I shall also recommend that Respondent be required to make the Union whole for any dues lost as a result of Respondent's unlawful conduct, with interest thereon in the amounts prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I shall further recommend that after Respondent and the Union have bargained concerning the decision to close Hollins Ferry Road plant and the affects of the transfer of Respondent's production operations from Hollins Ferry Road to Owings Mills on employees represented by the Union at Hollins Ferry Road, that Respondent also offer the employees who suffered discrimination immediate and full reinstatement to either their former positions or to positions that they would have occupied had Respondent bargained in good faith, without prejudice to their seniority or other rights and privileges. I shall also require Respondent to make them whole for any loss of pay they may have suffered by reason of the discrimination against them. Any backpay found to be due shall be computed, with interest in the manner proscribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 117 (1977).[8] Upon the entire record the findings of fact and the conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[9]

[8] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[9] In the event no exceptions are filed as provided by Section 102.45 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Universal Security Instruments, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Industrial Union & Marine Shipbuilding Workers of America, AFL-CIO concerning the decision and the effects of its decision to terminate its Hollins Ferry Road plant and transfer that plant's production to Respondent's Owings Mills, Maryland plant.

(b) Refusing to bargain in good faith with Industrial Union & Marine Shipbuilding Workers of America as the exclusive collective-bargaining representative of the employees at its Owings Mills, Maryland plant as part of the unit herein found to be appropriate.

(c) Refusing to bargain in good faith with Industrial Union & Marine Shipbuilding Workers of America, AFL-CIO regarding transfers of employees or other terms or conditions of employment.

(d) Discriminating against its employees with respect to wages, hours or conditions of employment because of their union membership or union activity.

(e) Dealing with employees, individually, who are represented by an exclusive collective bargaining representative regarding wages, hours, seniority or other terms and conditions of employment.

(f) Threatening employees with economic reprisals because they support and adhere to Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO as their exclusive collective bargaining representative or any other labor organization.

(g) In any like or related manner interfering with restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize Industrial Union of Marine & Shipbuilding Workers of America AFL-CIO as the exclusive collective bargaining representative of its employees in the appropriate unit employed at its Owings Mills, Maryland facility.

(b) Apply the terms of the collective-bargaining agreement executed by the Respondent and Industrial Union of Marine & Shipbuilding Workers of America AFL-CIO to the employees in the appropriate unit employed at its Owings Mills, Maryland plant.

(c) Make whole the employees at the Owings Mills plant for any losses of benefits which would have accrued to them under the terms of the collective-bargaining agreement during the time Respondent refused to apply the terms of the agreement to said employees.

(d) Make whole the above-named Union for any monies that would have been due the Union under the terms of any checkoff authorizations executed by Respondent's employees, but which were not deducted and transmitted to the Union as a result of Respondent's failure to apply the terms of the collective-bargaining agreement to said employees.

(e) Upon request, bargain with Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO concerning the transfer of 15 employees to the Respondent's Owings Mills plant, the effects on employees represented by that union at Hollins Ferry Road of the termination of that plant, the closure of the Hollins Ferry Road plant, and the transfer of its production operations to the Owings Mills plant, including the employees' seniority rights.

(f) After such bargaining, and in accordance with the section of this Decision entitled "The Remedy," offer

employees immediate and full reinstatement to their former positions at the Hollins Ferry Road plant, or to positions they would have occupied had Respondent bargained in good faith, without prejudice to their seniority or other rights and privileges and make them whole. Offer the employees listed in Appendix A immediate and full reinstatement, either to their former positions, or to positions at Owings Mills and make them whole in accordance with the section of this Decision entitled "The Remedy."

(g) Upon request, bargain with aforesaid union concerning the seniority of all employees transferred from the Hollins Ferry Road plant to the Owings Mills plant commencing on September 12, 1977, and thereafter, until the termination of the Hollins Ferry Road plant, and after such bargaining adjust such employees seniority in accordance with the agreement reached with the aforesaid union.

(h) Preserve and upon request make available to the Board, or its agents, for examination and copying, all payroll records, reports and all other records necessary to analyze the amounts of backpay and dues and the rights of employment under the terms of this Order.

(i) Post at its Owings Mills plant and at the Hollins Ferry Road plant if it reopens, copies of the attached notice marked Appendix "B,"[10] and mail to the last known address of each employee terminated from Respondent's Hollins Ferry Road plant, whose names are set forth in Appendix "A" and who are not employed at either the Owings Mills plant, or the Hollins Ferry Road plant a copy of such notice. Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed

[10] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by Respondent shall be posted immediately upon receipt thereof in conspicuous places and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other materials.

(j) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

It is also ordered that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

Dated, Washington, D.C. August 8, 1979.

LEONARD M. WAGMAN,
Administrative Law Judge.

APPENDIX A

Josephine Sanders
Romaine Neal
Mollie Jones
Peggy Anderson
Cannie Singer
Marie Lowe
Dessie Leicht
Debra Holmes
Zola Wheeler
Sharon Powers
Dawn Strozykowski
Nancee Moore
Catherine Gross
Kathleen Wonch
Laura Ellerbe
Harriet Wilson
Milagros Gonzalez
Barbara Williams
Doris Forrester
Vivian Cavey
Ella Hammond
Nancy Miller
Frankie Faulkner
Rosalie Emerson
Mary Hanssen
Barbara Simmons
Carmella Hernandez
Carolyn McCormick
Naomi LeBon

APPENDIX "B"

FORM NLRB—1727
(9-69)

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

An agency of the United States Government

AFTER A HEARING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT refuse to recognize the INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL-CIO as the exclusive collective bargaining representative of our employees in the appropriate unit which is:

> All production and maintenance employees employed by the Respondent at its Baltimore, Maryland facilities at 2829 Potee Street, 3341 Hollins Ferry Road, and at its Owings Mills, Maryland plant, including custodial and plant clerical employees, but excluding all office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT refuse to apply the terms of the collective-bargaining agreement to our employees in the appropriate unit working at our Owings Mills, Maryland plant.

WE WILL recognize INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL-CIO as the exclusive bargaining representative of our employees in the appropriate unit who work at our Owings Mills plant and will apply the terms of our collective-bargaining agreement with INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA AFL-CIO to all our

employees in the appropriate unit including employees working at our Owings Mills plant.

WE WILL make whole those employees at the Owings Mills plant for any loss of benefits they may have suffered by our failure to apply the terms of the collective-bargaining agreement to them.

WE WILL bargain in good faith with INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL-CIO concerning the decision to terminate the Hollins Ferry Road plant, the effects of that decision upon employees formerly of the Hollins Ferry Road plant represented by that Union and the transfer of that plant's production to the Owings Mills plant.

WE WILL bargain in good faith with INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL-CIO regarding the transfer and seniority rights of employees whom Respondent has unilaterally transferred from the Hollins Ferry Road plant to the Owings Mills plant since September 12, 1977.

WE WILL NOT discriminate against employees with respect to wages, hours, conditions of employment or tenure of employment to discourage membership in or activities or support for INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL-CIO or any other labor organization.

WE WILL NOT restrain, coerce or interfere with our employees' rights under Section 7 of the National Labor Relations Act.

WE WILL NOT bargain individually with employees who are represented by INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL-CIO or any other union, about their hours, wages, seniority or other terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of

their rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL make whole the above-named union for any monies that would have been due it under the terms of any checkoff authorizations executed by employees which were not deducted and transmitted to the Union as a result of our failure to apply the terms of the collective-bargaining agreement for these employees.

WE WILL offer to the employees, in the manner proscribed by the decision of the Board, reinstatement or employment either at our Hollins Ferry Road plant, or at our Owings Mills plant without prejudice to their seniority or other rights and privileges, and we will make such employees whole for any loss of pay suffered as a result of their termination, including interest.

UNIVERSAL SECURITY
INSTRUMENTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Edward A. Garmatz Federal Building, 101 W. Lombard Street — 9th Floor, Baltimore, Maryland 21201, Telephone (301) 962-2772.

Opposition

No. 81-253

Office - Supreme Court,
FILED
OCT 10 1981
ALEXANDER L. STE
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNIVERSAL SECURITY INSTRUMENTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, LOCAL 43

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably found that petitioner's production and maintenance employees at its newly-acquired plant constituted an accretion to the existing bargaining unit of production and maintenance employees at petitioner's other two plants in the Baltimore area.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 649 F. 2d 247. The Decision and Order of the National Labor Relations Board (Pet. App. 29a-75a) are reported at 250 N.L.R.B. 661.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1981. A motion for clarification of the court's decision was denied on June 17, 1981 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on August 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Universal Security Instruments, founded in 1969, initially manufactured security devices at various small facilities in the Baltimore, Maryland area. In 1971, petitioner leased a plant on Potee Street in Baltimore. In 1973, following a Board-conducted election, the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, Local 43 ("the Union"), was certified as the exclusive bargaining representative of petitioner's production and maintenance employees at the Potee Street plant, which was then petitioner's only facility. Thereafter, petitioner and the Union executed a three-year collective bargaining agreement covering the Potee Street employees. At about this same time, petitioner began to manufacture electronic smoke detectors. Pet. App. 2a-3a.

In the summer of 1975, petitioner expanded its operations by opening a plant in a converted warehouse facility on Hollins Ferry Road in Baltimore, some 2.7 miles from the Potee Street plant. In May 1976, petitioner formally recognized the Union as the collective bargaining representative at Hollins Ferry Road, without requiring proof that the Union represented a majority of the workers there. Pet. App. 45a-46a.

Petitioner soon became displeased with the conditions at the Hollins Ferry Road facility. The ceilings were too high, temperature and humidity could not be adequately controlled, employees were overcrowed, there was inadequate space for production, and state and local authorities had complained about fire hazards and inadequate sanitation. These conditions resulted in poor productivity and poor quality at the plant. Pet. App. 4a, 47a. Accordingly, a few months after leasing the Hollins Ferry Road plant, petitioner began to look for "a new permanent plant site." *Id.* at 47a; see also *id.* at 4a.

After considering several locations, petitioner settled on a plant location at Owings Mills in Baltimore County, Maryland, 27 miles from its other two facilities. The Owings Mills plant was selected because it was readily accessible by public transportation to and from Baltimore. Pet. App. 4a. Petitioner regarded such access to public transportation to be necessary in order to attract a labor force for the plant, because it planned to hire from the Baltimore metropolitan area labor pool. Petitioner noted, in fact, that a bus line which terminated within walking distance of the Owings Mills site also ran by the Potee Street plant (*id.* at 47a), a factor that responsible officials of the company "considered to be positive." *Id.* at 4a.

In August and September 1977, petitioner placed help-wanted ads for the Owings Mills plant in the Baltimore Sun and two suburban Baltimore newspapers. Pet. App. 48a, 60a. The Owings Mills plant began operations on September 12, 1977. Pet. App. 49a. Petitioner used the new plant at Owings Mills to supplement its existing production facilities and thereby to expand its production of smoke detectors. Pet. App. 4a, 48a-50a. A centralized management system controlled all three of petitioner's facilities. This central management included control over production by the director of operations, who maintained offices at all three plants and established the qualifications for employees at Owings Mills. The director of human relations, in charge of hiring, firing, and employee relations for each plant, hired the new employees for Owings Mills and thereafter interviewed and transferred employees from Hollins Ferry Road to Owings Mills (see *infra*). Engineering, maintenance, personnel, payroll, and purchasing all were performed on a company-wide basis subject to central control. These functions were performed by personnel employed at

petitioner's Potee Street plant until December 1977, when petitioner transferred its headquarters to the Owings Mills plant.

During the summer preceding the opening of the Owings Mills plant, there were between 350 and 360 employees in the then-existing bargaining unit—300 at Hollins Ferry Road and 50 to 60 at Potee Street. Pet. App. 47a. By the end of September 1977, there were 65 workers employed at Owings Mills. *Id.* at 5a, 50a. On September 28, 1977, counsel for petitioner informed the Union that petitioner refused to recognize or bargain with the Union for the 65 employees at Owings Mills. Pet. App. 51a.

In early October, the Chairman of the company recognized the need for a cadre of trained employees at Owings Mills. Fifteen employees at the Hollins Ferry Road plant were transferred to Owings Mills.[1] Some who declined to transfer were laid off due to adverse business conditions. After the transfers, there were 80 employees at Owings Mills, 200 employees remained at Hollins Ferry Road by that time, and approximately 50 at Potee Street. Pet. App. 5a, 52a.

On October 31, 1977, setbacks in the smoke detector market and other factors forced petitioner to lay off all of the employees at Owings Mills and 150 of the 200 employees at Hollins Ferry Road. The layoff was terminated in January 1978. Reduced demand nevertheless required petitioner to reduce the price of its smoke detectors. This rendered unprofitable the continued production of smoke detectors

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[1]One or two of the supervisory and managerial employees at Owings Mills had been employed at the Hollins Ferry Road plant, and the remainder of such employees at Owings Mills were trained at Hollins Ferry Road. Pet. App. 50a.

at the inefficient Hollins Ferry Road plant. Accordingly, in February 1978, petitioner decided to terminate operations there. Petitioner immediately began to offer to transfer between 90 and 100 employees at Hollins Ferry Road to the Owings Mills plant. Ultimately, 72 employees accepted transfers to Owings Mills, and 31 refused reassignment. Pet. App. 6a-7a, 54a-56a.[2]

2. Adopting the decision of the Administrative Law Judge (Pet. App. 30a), the Board found that the production and maintenance employees at petitioner's newly established plant at Owings Mills constituted an accretion to the existing bargaining unit of production and maintenance employees at petitioner's Potee Street and Hollins Ferry Road plants. The Board, therefore, held that petitioner was obligated to recognize the Union as the bargaining representative of its employees at the Owings Mills plant and to apply the terms of the existing collective bargaining agreement to them retroactive to September 1977. Pet. App. 30a-31a, 35a, 58a-61a, 66a-68a.[3]

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[2]Two of the 31 who refused reassignment to Owings Mills accepted offers of transfer to the Potee Street plant, and the remaining 29 were placed on a preferential hiring list there. Pet. App. 55a-56a.

[3]The Board further found that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally transferring unit work and employees from Hollins Ferry Road to Owings Mills in October 1977 and by offering Hollins Ferry Road employees transfers to the Owings Mills plant in February 1978 without consulting or bargaining with the Union. Further, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain over its decision to close the Hollins Ferry Road plant and the effects of that decision on the unit employees. Finally, the Board found that petitioner violated Section 8(a)(1) of the Act by threatening employees with reprisal if they should continue to adhere to the Union. Pet. App. 32a-34a, 62a-65a. The court of appeals upheld the Board's conclusions and remedial orders, except for the requirement that petitioner bargain over the closing of the Hollins Ferry Road plant and a back pay award to 29 employees who refused an

The Board observed that, under its decisions, "[w]hether or not a particular operation constitutes an accretion or a separate unit turns, of course, on the entire congeries of facts in each case" (Pet. App. 59a, quoting *The Great A & P Tea Co. (Family Savings Center)*, 140 NLRB 1011, 1021 (1963)). In this case, the Board concluded that "the balance of factors support[s] a finding of accretion at the time the Union requested extension of the contract to the new Owings Mills plant." Pet. App. 59a-60a. Thus, the Board noted that petitioner's stated purpose in establishing the Owings Mills plant was to augment the company's production of smoke detectors; that both the Hollins Ferry Road and the Owings Mills plants produced the same model smoke detector; that the work required similar skills; and that the employees of the Hollins Ferry Road and Owings Mills plants were substantially interchangeable. *Id.* at 59a-60a. The Board also relied on the fact that the managerial functions of the three plants—including its labor relations—were centralized. Pet. App. 60a-61a. Finally, although it noted that the Owings Mills plant "was about 27 miles from both the Potee Street and Hollins Ferry Road plants" (*id.* at 60a), the Board did not find that fact controlling in the circumstances of this case. In this regard, the Board pointed out that the "three plants drew their employees from the same metropolitan Baltimore labor market," that petitioner advertised in a Baltimore city paper as well as suburban papers, and that petitioner selected the Owings Mills location "because of its proximity to a Baltimore city bus line which also ran past the Potee Street plant." *Ibid.*[4]

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offer to transfer to the Owings Mills plant after the closing at Hollins Ferry Road. Pet. App. 17a-18a, 23a-26a.

None of these issues is presented in the petition for a writ of certiorari. See Pet. 6 n.2.

[4]The Board rejected petitioner's contention that a finding of accretion was barred by a provision in the collective bargaining agreement that limited its coverage to the Potee Street and Hollins Ferry Road plants.

3. The court of appeals upheld the Board's decision and enforced its order. The court stated (Pet. App. 10a; citations omitted):

> A finding of an accretion by the Board is similar to the Board's certifying a particular group of employees as an appropriate bargaining unit because in both the Board is using its expertise to determine the most appropriate mix of employees for a particular unit. And, just as when the Board certifies a unit, the Board's finding of an accretion is a matter which is generally committed to its discretion. Thus, its finding "should not be set aside unless the reviewing court is convinced that the Board has acted in an arbitrary and capricious manner."

Applying that test to the circumstances of this case, the court concluded that the particular factors relied upon by the Board were "certainly sufficient to show that the Board did not abuse its discretion in finding an accretion." Pet. App. 12a. The factors supporting this conclusion, in the court's view, were that "(1) there was a similarity of skills required at Owings Mills and the other plants; (2) there was a similarity of products produced; (3) the new facility was geographically close to the other two facilities when the metropolitan area is viewed as a whole; and (4) management, and most importantly, employee relations, were centralized." *Ibid.*.[5]

The Board explained that the place designations in the contract "merely defined the extent of the unit as it existed at the time the agreement was executed" and that the Union did not thereby "waive its right to extend the contract to an accretion" (Pet. App. 61a).

[5]The court enumerated the following factors as relevant to the determination of accretion. Pet. App. 11a; citations omitted.

> (1) [S]imilarity of working conditions; (2) job classification; (3) skills and functions; (4) similarity of products; (5) interchangeability of employees; (6) geographical proximity; (7) centralization of

ARGUMENT

The Board's determination, affirmed by the court of appeals, that, in the circumstances of this case, petitioner's Owings Mills employees constituted an accretion to the existing bargaining unit at petitioner's other two plants in the Baltimore area was a reasonable exercise of the Board's discretion in representation matters. Further review of this fact-bound determination is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

1. In Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), Congress authorized the Board to determine "whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Section 9(b) long has been interpreted by this Court to vest in the Board broad discretion to determine what constitutes an appropriate unit. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800, 805 (1976). As the court of appeals recognized in the instant case (Pet. App. 11a, quoted at page 7, *supra*), this rule recognizing the Board's broad discretion in representation matters applies equally to the Board's determination whether employees newly hired by an employer should be regarded as an accretion to (*i.e.*, included within) an existing bargaining unit or should instead be treated as a separate bargaining unit.

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managerial control; (8) functional integration of the business; (9) collective bargaining history.

The court did not find the validity of the Board's determination in this case to be undermined by the fact that the Board did not analyze all nine of these factors. The court found "no requirement that all of the listed factors be present" in any given case, "for to so require would be to hamstring the Board by requiring it to plug each unique case into an artificial test." Pet. App. 12a.

Accordingly, as the court of appeals held, a determination regarding accretion " 'should not be set aside unless a reviewing court is convinced that the Board has acted in an arbitrary and capricious manner.' " Pet. App. 10a, quoting *NLRB* v. *R. L. Sweet Lumber Co.*, 515 F. 2d 785, 794 (10th Cir.), cert. denied, 423 U.S. 986 (1975)). See also *Lammert Industries* v. *NLRB*, 518 F. 2d 1223, 1225 (7th Cir. 1978); *International Union, UAW* v. *NLRB*, 231 F. 2d 237, 243 (7th Cir.), cert. denied, 352 U.S. 908 (1956); *NLRB* v. *Security-Columbian Banknote Co.*, 541 F. 2d 135, 140-141 (3d Cir. 1976); *NLRB* v. *Baton Rouge Waterworks Co.*, 417 F. 2d 1065, 1067 (5th Cir. 1969); cf. *Local 627, International Union of Operating Engineers* v. *NLRB*, 595 F. 2d 844, 850-851 & n.20 (D.C. Cir. 1979). Plainly the Board's determination in this case was not arbitrary, capricious, or an abuse of discretion.

The Board will find an accretion of the additional employees to an already existing unit where there exists a sufficient community of interest such that the accreted employees do not have a substantially separate identity and thus are properly governed by the larger group's choice of a bargaining representative. See, *e.g.*, *NLRB* v. *Food Employers Council, Inc.*, 399 F. 2d 501, 502 (9th Cir. 1968). In making this determination, the Board considers such factor as "integration of operations; centralization of managerial and administrative control, geographic proximity; similarity of working conditions, skills and functions; common control over labor relations; collective bargaining history; and interchanageability of employees." *The Great A & P Tea Co.* (*Family Savings Center*), 140 N.L.R.B. 1011, 1021 (1963). The courts of appeals uniformly have approved the Board's consideration of these factors. See, *e.g.*, *Kaynard* v. *Mego Corp.* 633 F. 2d 1026, 1030-1033 (2d Cir. 1980); *Westinghouse Electric Corp.* v. *NLRB*, 440 F. 2d 7, 11 (2d Cir.), cert. denied, 404 U.S. 853 (1971);

Lammert Industries v. *NLRB, supra,* 578 F. 2d at 1225; *NLRB* v. *Security-Columbian Banknote Co., supra,* 541 F. 2d at 140-141; *NLRB* v. *Sunset House,* 415 F. 2d 545, 548 (9th Cir. 1969);[6] *NLRB* v. *Food Employers Council, Inc.,* 399 F. 2d 501 (9th Cir. 1968); *Local 620, Allied Industrial Workers of America* v. *NLRB,* 375 F. 2d 707, 711 (6th Cir. 1967).

The Board followed this established approach in the instant case (Pet. App. 30a, 59a-61a), as did the court of appeals (*id.* at 11a-14a). Specifically, the court found the Board's decision to be fully supported by the similarity of the skills required of employees at the three plants, the similarity of products manufactured at the Owings Mills and Hollins Ferry Road plants, the geographic proximity of Owings Mills to the other plants considering the metropolitan area as a whole, and centralized management, particularly in labor relations. *Id.* at 12a. In addition, the transfer of a cadre of trained employees from Hollins Ferry Road to Owings Mills in October 1977 and the eventual transfer of an additional 72 employees from the former plant (where they were represented by the Union) to the latter in February 1978, when the Hollins Ferry Road plant was closed, further indicate that management effectively viewed these two plants as part of a single unit for the production of smoke detectors.

Petitioner's contention that the Board's finding of accretion was improper depends almost entirely upon the single fact that the Owings Mills plant is located 27 miles from petitioner's other two plants. See Pet. 7, 8, 11, 12, 14, 16, 17. Indeed, petitioner even asserts that the Board "[t]otally overlook[ed]" this fact. *Id.* at 11; see also *id.* at 12. Contrary to petitioner's contention, however, the Board explicitly

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[6]Cited with approval in *Spring City Knitting Co.* v. *NLRB,* 647 F. 2d 1011, 1014 (9th Cir. 1981).

recognized the physical distance between the plants. Pet. App. 60a. But viewing the factor of "geographic proximity" from a broader perspective, the Board took into account that all three of petitioner's plants drew employees from the Baltimore metropolitan labor market, that petitioner had advertised in the Baltimore Sun and two suburban newspapers for workers for the Owings Mills plant, and that petitioner had selected the Owings Mills site because of its proximity to a Baltimore bus line that ran past the Potee Street plant. *Id.* at 60a. Because petitioner viewed the relationship between its three plants in the context of the Baltimore metropolitan area as whole, it was proper for the Board and the court of appeals to do so as well. And, as the court of appeals held, "the new facility *was* geographically close to the other two facilities when the metropolitan area is viewed as a whole." *Id.* at 12a; emphasis added.

In any event, geographic proximity is only one of a number of factors to which the Board may look in making a determination of accretion, and a number of these other factors supported the Board's finding of accretion here. Petitioner therefore errs in suggesting that the physical distance between the plants must be given dispositive weight. The Board's application of the well-recognized test to the particular facts of this case therefore does not warrant review by this Court.[7]

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[7]Petitioner maintains that the Board's application of the accretion doctrine in this case conflicts with Board unit determinations establishing what petitioner characterizes as "an almost insurmountable presumption of the appropriateness of the single-plant unit." Pet. 12. That is not the case. Rather, in *Haag Drug Co.*, 169 N.L.R.B. 877, 878 (1968), the Board emphasized that the presumption is "not a conclusive one and may be overcome where factors are present in a particular case which would counter the appropriateness of a single-store unit." Thus, "Board decisional law amply demonstrates that the presumption is not unassailable" (*Big Y Foods, Inc.*, 238 N.L.R.B. 860, 861 & n.4 (1978)). Petitioner concedes (Pet. 11) that the Board, in making a determination

2. Contrary to petitioner's contention (Pet. 13, 15-19), the court of appeals' decision does not conflict with decisions of other courts of appeals or with earlier decisions of the Board. In *American Can Co.* v. *NLRB*, 535 F. 2d 180 (2d Cir. 1976) (see Pet. 17), for example, there were rival unions seeking to represent the particular group of lithographic employees at the new plant. The court held that because "a real question concerning the representation of the lithographic workers existed" (535 F. 2d at 188), this group could not be accreted to the larger unit represented by one of the unions at the new plant until the claim of the other union, which had represented the lithographic employees at the old plant, had been resolved. No such factor undermining a community of interest among the employees is presented here. *Spartans Industries, Inc.* v. *NLRB*, 406 F. 2d 1002 (5th Cir. 1969) (see Pet. 18), is inapposite for similar reasons: that case involved the merger of companies whose employees were represented by separate unions in separate bargaining units, and the Board and court accordingly gave weight to this collective bargaining history (406 F. 2d at 1005).

In *Sheraton-Kauai Corp.* v. *NLRB*, 429 F. 2d 1352 (9th Cir. 1970) (see Pet. 13, 18), in addition to the 100-mile separation between the hotels already included in the bargaining unit and the new hotel on a different island in Hawaii, the local manager of the new hotel had authority to make personnel decisions, and "[s]ome 90 percent of the

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with respect to accretion, looks to the same factors that it considers in determining the appropriateness of a multiple-plant unit. Accordingly, there is no more reason why a presumption in favor of a single-plant unit should be irrebuttable in the former situation than there is in the latter.

* * * employees were hired on the island of Kauai" (*id.* at 1354 n.4). Accordingly, the court deferred to the Board's judgment that the new hotel should be a separate unit, even while recognizing (*id.* at 1356) the possibility that the Board, in the exercise of its discretion in representation matters, might have taken another approach. Similarly, in *NLRB* v. *Security-Columbian Banknote Co.*, 541 F. 2d 135 (3d Cir. 1976) (see Pet. 17), the new plant "was run as a sufficiently autonomous entity to negate the community of interest necessary to an accretion finding" (*id.* at 141). The "plant's day-to-day operations were run largely" under separate supervision, and there was no showing of substantial "interchange of employees and work products and the transfer of employees between the two plants" (*ibid.*). Recognizing the Board's discretion in accretion decisions (*id.* at 140-141), the court accordingly sustained the Board's finding of no accretion.[8] In *Hershey Foods Corp.*, 208 N.L.R.B. 452 (1974), the new plant was maintained as "a separate corporate entity, with its plant organized as an autonomous operation, having its own personnel office, [and] separately published work rules * * *." *Id.* at 458.[9]

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[8]Thus, in these cases, as in *American Can* and *Spartans Industries*, *supra*, the court of appeals *upheld* a Board finding of no accretion, thereby *sustaining* the Board's exercise of its discretion in the facts of the particular case. In this respect as well they are fully consistent with the decision below, which likewise defers to the Board's discretion in making an accretion determination. Pet. App. 10a, 12a.

[9]Other cases cited by petitioner (Pet. 9-10, 15-18) are wholly inapposite. Cases such as *Cooper Thermometer Co.* v. *NLRB*, 376 F. 2d 684 (2d Cir. 1967); *NLRB* v. *Rapid Bindery, Inc.*, 293 F. 2d 170 (2d Cir. 1961), and *Local 57, ILGWU* v. *NLRB*, 374 F. 2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967), all involved only the propriety of Board remedial bargaining orders in the context of plant relocations that were implemented without allowing the unions notice and opportunity to bargain over the effects of those decisions (and, in the *Local 57* case, for the purpose of evading the union). None of these cases involved either a unit determination or an issue of an accretion to an existing bargaining unit. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), likewise presented no unit determination or accretion issues.

3. Finally, there is no merit to petitioner's contention (Pet. 10, 15, 19) that the Board's finding of an accretion was improper because the Owings Mills employees did not specifically evidence a preference for the Union. The accretion policy represents an accommodation between "the somewhat conflicting policies of stability in bargaining relations, * * * and assurance to employees of the right to choose their own bargaining agents." *NLRB* v. *Food Employers Council, Inc., supra*, 399 F. 2d at 504. As the court of appeals explained, where an employer adds a group of employees who share a "community of interest" with an existing bargaining unit, those employees are treated as if they were "newly hired employees replacing workers within the unit" and are accordingly "presumed to support the uni[on] in the same ratio as those replaced" (Pet. App. 13a, citing *Lammert Industries* v. *NLRB, supra*, 578 F. 2d at 1226). It follows that those "employees are * * * properly governed by the unit's choice of bargaining representative." *Lammert Industries* v. *NLRB, supra*, 578 F. 2d at 1225 n.3; accord, *NLRB* v. *Food Employers Council, Inc., supra*, 399 F. 2d at 502. In the present case, the Board properly accommodated the competing policies after weighing the relevant factors and finding a community of interest between the Owings Mills employees and the other employees of petitioner who were in the then-existing bargaining unit. Accordingly, petitioner's contention that the Board abused its discretion in this regard is unfounded.

Indeed, the 15 employees transferred from Hollins Ferry Road to Owings Mills in October 1977 and the 72 employees transferred in February 1978 all had been represented by the Union at Hollins Ferry Road. Thus, although the date the Board found the accretion to have occurred was September 12, 1977, it is clear that by February 1978, the clear majority of the workforce at the Owings Mills plant consisted of employees who had been represented by the Union

at Hollins Ferry Road. As a result, even when the Owings Mills plant is considered in isolation, as petitioner urges, when the eventual workforce at that plant is viewed as a whole, petitioner's contention (Pet. 5-15) that the Board's finding of accretion has resulted in frustration of the rights of employees at Owings Mills to select or reject a bargaining agent is particularly misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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